89-1707

No. _____

In The

Supreme Court of the United States

October Term, 1989

VINCENT JAMES LANDANO,

Petitioner,

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, AND IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in order to satisfy the exhaustion requirement of 28 U.S.C. sec. 2254, a habeas petitioner must present to the state courts the factual predicate of a claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) with the same degree of specificity as required of other federal claims which arise from facts not suppressed by the State and reasonably known to the petitioner.

2. Whether a state prosecutor should not be deemed constructively to have waived the defense of non-exhaustion of state remedies when that prosecutor thwarted exhaustion of state remedies by engaging in a systematic pattern of bad faith suppression of exculpatory evidence while the matter was pending in state court.

3. Whether a supplemental jury charge violates the Sixth Amendment of the United States Constitution when it conveys that jurors in the minority will inevitably waste the state's time and money by forcing a retrial.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption of this petition, the following parties appeared in the proceedings below: (1) Peter Perretti, Attorney General, State of New Jersey; (2) Leslie Fay Schwartz, Deputy Attorney General; (3) The Office of the Hudson County Prosecutor; (4) Kearny Police Department; (5) Newark Police Department; (6) Jersey City Police Department; (7) Perth Amboy Policy Department; and (8) Honorable H. Lee Sarokin, U.S. District Judge (Nominal Respondent).

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OPINIONS BELOW

The opinion and judgment of the court below, review of which is sought in this Court, appears at App. 1 to 68. That opinion, not yet published, is *Landano v. Rafferty, et al.*, Nos. 89-5638, 89-5625, and 89-5504 (3d Cir., February 27, 1990). The Third Circuit's denial of a petition for rehearing, including dissenting votes, appears at App. 69 to 71.

The Third Circuit's judgment reversed and vacated a grant of a conditional writ of habeas corpus by United States District Judge H. Lee Sarokin of the District of New Jersey. Judge Sarokin's opinion in support of the issuance of that writ appears at App. 76 to 138 and was published as *Landano v. Rafferty, et al.*, 126 F.R.D. 627 (D.N.J. 1989).

Other published opinions arise from Mr. Landano's prior unsuccessful attempt to obtain a conditional writ of habeas corpus. Judge Sarokin denied a writ of habeas corpus in *Landano v. Rafferty, et al.*, 670 F. Supp. 570 (D.N.J. 1987), *reh. den.* 675 F. Supp. 204 (D.N.J. 1987). See App. 140 to 189. The Court of Appeals for the Third Circuit affirmed in *Landano v. Rafferty, et al.*, 856 F.2d 569 (3d Cir. 1988). This Court declined review, *Landano v. Rafferty, et al.*, ___ U.S. ___, 109 S. Ct. 1127 (1989).

There are several unpublished state court opinions in this matter. There is an opinion by the state trial court denying a motion for a new trial based upon newly discovered evidence, *State v. Landano*, No. 73-76 (L. Div. December 1, 1978). New Jersey's Appellate Division affirmed that ruling and simultaneously affirmed the judgement of conviction on direct appeal in *State v. Landano*, No. A-4174-76 (App. Div., March 21, 1980), *cert. den.* 85 N.J. 98 (1980). The state trial court denied Mr. Landano's application for post-conviction relief in an unpublished letter memorandum *State v. Landano*, No. 73-76

(L. Div. December 3, 1982). The Appellate Division affirmed in an unpublished opinion, *State v. Landano*, No. A-2649-82T4 (App. Div., January 30, 1984), *cert. den.* 97 N.J. 620 (1984).

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. sec. 1254 in that on February 27, 1990, the Court of Appeals for the Third Circuit entered judgment in this case reversing and vacating a judgment of a United States District Court granting a conditional writ of habeas corpus. This is a civil matter that may be reviewed by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Sixth Amendment, United States Constitution
Rights of the Accused.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution
Section 1. Citizens of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. sec. 2254(c)

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

INTRODUCTION

This is a petition for certiorari seeking review of the Third Circuit's reversal of a judgment by a district court granting a conditional writ of habeas corpus. The district court, relying upon extensive documentary evidence as well as live testimony, found that the prosecutor in this case engaged in a systematic pattern of bad faith suppression of exculpatory evidence that is material to the issue of petitioner's guilt or innocence and issued a writ of habeas corpus releasing the petitioner from custody. The writ permitted the State to retry Mr. Landano within a specified time period.

The Court of Appeals for the Third Circuit reversed and vacated the district court's orders, concluding that the petitioner failed to exhaust state remedies with respect to two items of documentary evidence that had been suppressed by the prosecutor during state trial and post-conviction proceedings but had been discovered by Mr. Landano's investigators. Circuit Judge Max Rosenn issued an eloquent dissent urging the court to adopt the rule of the Eighth Circuit that a petitioner need not return to the state courts every time he discovers a new piece of

evidence suppressed by the state prosecutor provided the new evidence relates to the specific *Brady* issue previously raised in state court.

Judge Rosenn wrote:

> [U]nder the facts established here there is a grave threat to the fundamental right to personal liberty of an innocent man unless the conditional grant of the writ of habeas corpus is allowed.

App. 67.

The petitioner applied to the Circuit for rehearing in banc. Judge Rosenn was unable to vote on that application because of his senior status. Chief Judge Higginbotham as well as Judges Stapleton and Becker voted for rehearing. The application was denied by the banc majority. A stay of the mandate was granted until May 3, 1990 to remain in effect thereafter provided a petition for certiorari was filed with this Court on or before that date.

GENERAL BACKGROUND

On August 13, 1976, during the course of an armed robbery of a check cashing facility in Kearny, New Jersey, a perpetrator fatally shot Newark Police Officer John Snow. App. 146 to 147.

The check cashing facility operated out of a trailer situated on a parking lot in an industrial area. On the morning of the crime, a car pulled into the parking lot and two men emerged. Allen Roller, a confessed participant in the armed robbery, approached the trailer, forced entry, robbed the occupants at gun point, and retreated to the car. App. 146 to 147.

While Roller, who had a red beard on the day of the crime, robbed the trailer, a dark-haired perpetrator held up a customer seated in a van near the trailer. During the

course of that robbery, Newark Police Officer John Snow pulled up in a police car and parked, apparently unaware of the on-going robberies, behind the van. As a favor to the owner of the check cashing facility, Snow was delivering $46,000.00 in cash. App. 146 to 147.

Only one individual witnessed what next transpired. Joseph Pascuitti stood on a loading deck of a warehouse a short distance from the police car. Pascuitti saw a white male with closely cropped curly hair and no moustache standing near the driver's side of the police car. He saw the curly-haired perpetrator raise a gun over his head and lower it to the level of the police car's driver. Pascuitti heard the gun fire, turned away and then saw the getaway car speed by, the dark-haired perpetrator driving. App. 147 to 149.

On the day of the crime, some hours thereafter, the petitioner was photographed as he cashed a check at an unrelated check cashing facility in Staten Island, New York. The photo shows Mr. Landano with long, straight black hair and a prominent, bushy mustache. App. 150; Trial Exhibit D-13.

Victor Forni, an associate of Allen Roller in a motorcycle gang called "The Breed", closely matched, in physical appearance, the description of the killer offered by Pascuitti. The gun used to kill Snow was Victor Forni's gun. App. 176 to 177.

The prosecutor, Thomas Mulcahy, tried to extradite Forni from New York City, where he was captured and held shortly after the crime, but Forni successfully delayed extradition. After failing to extradite Forni, the prosecutor turned his efforts to extraditing the petitioner, Mr. Landano. Mulcahy Lecture Transcript at 51 to 53; see also, App. 182.

Mr. Landano had been identified by Roller after Roller was apprehended in Denver, Colorado attempting to flee. In a lecture prosecutor Mulcahy gave in July of 1981, tape recorded and transcribed for petitioner, see App. 178 and 182, Mulcahy, speaking figuratively, bragged that "somewhere on route between Denver and Newark Airport . . . they [federal and state authorities] h[u]ng Roller out of the plane" and Roller named Landano as the killer of Snow. Mulcahy Lecture Transcript, 40:6-41:20.

The prosecutor, who described himself as being under "pressure" to get a conviction because the case involved the killing of a police officer, Mulcahy Transcript at 8, decided to follow the lead of Roller by targeting Landano as the killer of Officer Snow. Landano was more easily extradited than Forni because in the words of the prosecutor, his attorney at the time, was "incompetent", "an idiot." Mulcahy Transcript 50:2,11. Moreover, the state's extradition of Landano was facilitated with an affidavit altered by the State to make it appear that petitioner had been identified by an eyewitness on the very day of the crime. Trial Transcript, Vol. 3 at A51:7 to A52:25.

THE TRIAL

1. Identification Testimony

The State's case against Mr. Landano was based primarily upon eyewitness identification testimony. The State produced Joseph Pascuitti who did not identify Mr. Landano but included him in the set of possible perpetrators by describing the killer as having dark hair. Also, Pascuitti testified that the killer was the man who drove the getaway car. App. 146 to 148.

Raymond Portas, a truck driver, testified that he saw the getaway car as it fled the crime scene and maneuvered around his truck. He testified that on April 15, 1977, a few days before the start of the trial, he identified Mr. Landano's photograph as depicting the driver of the getaway car. App. 148 to 152.

Jacob Roth, the owner of the check cashing facility, testified that he too identified a photograph of Mr. Landano when shown an array of photographs by investigators. Testimony by investigators established that Jacob Roth had been unable to identify Mr. Landano when shown an array of photographs of August 26, 1976, but that five days later, on August 31, 1976, Jacob Roth was able to make a positive photographic identification. App. 179 to 180.

Allen Roller, the admitted co-perpetrator of the crime, testified that Mr. Landano told him he "had to ice [kill] the cop" as they sped away in the getaway car. He denied that his associate Forni had any active role in the crime and insisted that Forni never actively participated in crimes with him. App. 149 and 173.

2. Petitioner's Efforts at Trial to Prove that Forni was the Killer

Throughout the trial, petitioner's counsel, James Flynn, attempted to raise the inference that Forni, not petitioner, was the killer. Cross-examining Roller, Mr. Flynn attempted to establish that he was protecting Forni because the "Breed" would execute anyone who testified against a fellow "Breed" member. Moreover, he attempted to elicit from Roller an admission that Forni had actively participated with Roller in other crimes. Roller denied such participation by Forni. App. 173; Trial Transcript, Vol. 10 at 119-14-20.

In cross-examining various eyewitnesses, Mr. Flynn attempted to determine whether they had selected Forni's photograph from various arrays they had been shown. Thus, although the State provided no discovery establishing this fact, Mr. Flynn elicited from Jonathan Roth (Jacob Roth's college age son) that in making his photographic selection, he had been torn between Mr. Landano's photograph and Forni's. Trial Transcript., Vol. 6 at 35 to 36. Mr. Flynn confronted various other witnesses with a photograph of Forni trying to establish that they too had selected his photograph as depicting the dark-haired perpetrator. Trial Transcript, Vol. 7 at 95:25 to 96:1. At one point, Mr. Flynn asked Pascuitti if he had ever selected a photograph of Forni, marked S-39C at trial. At first, Pascuitti seemed to concede that he had selected Forni's photograph but that success was immediately undone by the trial prosecutor's re-direct examination. Trial Tr., Vol. 8 at 103:3-12.

3. The Trial Court's Coercive Charge

The jury was troubled by the State's case which was riddled with internal inconsistencies. It asked that extensive portions of testimony be read back including the testimony of Pascuitti and the Roths. App. 62; Trial Transcript, Vol. 19 to 87:10-14. After two days of deliberation and an intervening weekend, the jury emerged unequivocally hung. It handed the trial judge the following note:

> Your honor, we honestly feel we cannot get a twelve vote count on guilty or not guilty. We tried on all eight counts. We can't say twelve to zero guilty or not guilty. What should we do?

Trial Transcript., Vol. 21 at 2.

The trial court, instead of accepting the jury's hung verdict, sent them back for deliberations with a supplemental charge that *inter alia*, stressed the economic cost of the trial:

> Ladies and gentlemen, we are in the fifth week of this trial. And I think you realize what is invested as far as time, money and everything else.

Trial Transcript., Vol. 21 at 2.

Elsewhere in its supplemental charge, the court misrepresented the prospect of retrial, characterizing it as a certainty, and ruled out the prospect of newly discovered evidence:

> You should consider also, and I'd like you to pay close attention to this, that this case at a future time must be decided; that you're selected in the same manner and from the same source from which any future jury must be selected. There's no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it; or that more or clearer evidence will ever be produced on one side or the other. "Having said that, and saying it forcefully to you, ladies and gentlemen, I ask you to retire once again to the jury room and invest more time in the case and see what you come up with, please. Thank you."

Trial Transcript Vol. 21 at 2:4 to 4:20.

Fifty-three minutes after the foregoing charge, the jury returned a verdict of guilty on all eight counts. Trial Tr., Vol. 21 at 4 *et seq.*.

PETITIONER'S FIRST STATE POST-CONVICTION HEARING

While his direct appeal was pending, Mr. Landano discovered evidence, previously suppressed by the State, demonstrating that Forni had actively participated in other crimes with Roller having a similar *modus operandi* to the crime involved here. The New Jersey Appellate Division remanded the matter for an evidentiary hearing before the trial judge. App. 173 to 174.

The hearings were held in November of 1978. The petitioner introduced various police reports reporting eyewitness identifications of Forni as an active participant in two armed robberies of a coin exchange at Perth Amboy, New Jersey, that took place shortly before the crime involved here. Roller was also identified as a participant in those crimes. Mr. Landano introduced testimony by a Perth Amboy detective that he had been told to "keep quiet" about the Perth Amboy investigations by a member of the prosecutor's investigative staff. Petitioner also introduced newly discovered evidence tying Forni to an armed robbery of a tavern in Jersey City, New Jersey. Roller too was identified as a participant in that crime. App. 173 to 174.

The trial court found the new evidence to be exculpatory in that it impeached Roller's claim that Forni never actively participated in crimes with him and it affirmatively established a *modus operandi* involving Forni's active participation in armed robberies with Roller. Nevertheless, by order dated December 1, 1978, the trial court denied relief, finding that the conviction was amply supported by other eyewitness testimony by Jacob Roth, Raymond Portas and Joseph Pascuitti. The Appellate Division affirmed on March 21, 1980 and the New Jersey Supreme Court denied certification on July 8, 1980, 85 N.J. 98 (1980). App. 174 to 175.

PETITIONER'S SECOND STATE POST-CONVICTION HEARING

On March 31, 1982, petitioner filed a petition for post-conviction relief in the state trial court. He alleged that the prosecutor had coerced Jacob Roth into giving false identification testimony against him, that the prosecutor had used highly improper techniques to secure

Raymond Portas' photographic identification of him, and that the prosecutor had concealed Portas' initial photographic selection which depicted someone other than Mr. Landano, possibly Forni. See, State Verified Petition and Brief.

In his state brief, in support of his verified petition, petitioner left no doubt that he was contending that the prosecutor was suppressing identification statements inculpatory of Forni and exculpatory of himself:

> . . . the Court will find the following factual pattern emerging – a pattern that explains the pressure brought to bear on Portas and Roth and that involves the most blatant violation of petitioner's constitutional rights:
>
> – Within days of the crime, New Jersey police, working in cooperation with other agencies including the FBI, focused their attention on a group of individuals associated with a motorcycle gang known as the Breed, as suspects in the crime.
>
> – One such suspect, Victor Forni, fit the physical description offered by eyewitnesses of the man who shot and killed Officer Snow. Evidence suppressed by the prosecutor and offered by the defense as the basis for a previous motion for a new trial reveals that Forni was suspected by New Jersey authorities of having actively participated with the Breed in armed robberies prior to the Kearny incident. A gun traced to Forni was used to kill Snow.
>
> – When Allen Roller, a former president of the Breed, was apprehended, he implicated the petitioner, Mr. Landano, as the killer of Officer Snow in an effort to protect the true perpetrator, someone within the Breed; Landano had no association with that gang and never knew Roller. At trial, Roller admitted that the Breed visited violence on Breed associates who implicate others in crimes.

– Physical and eyewitness testimony did not support Roller's claim that Landano was the killer. He had neither a pencil-thin mustache nor a full head of curly hair on the day of the crime – two physical characteristics attributed by relevant eyewitnesses to the killer. Rather, he had straight hair and a full bushy mustache.

– Forni was apprehended in New York City.

– Landano, too, was arrested in New York City.

– Forni's lawyer successfully fought extradition for approximately two years. Landano was almost immediately extradited; a partially forged affidavit was used by the prosecutor as part of his successful effort to extradite Landano.

– The prosecutor was under tremendous pressure to obtain a rapid conviction of the killer of Officer Snow. Forni, the key suspect, was unavailable. Mr. Landano became the target of the investigation.

– *Eyewitnesses were pressured, cajoled, or led into identification of Mr. Landano. In some cases no record was made of eyewitness identification of Forni.*

– Ultimately, a conviction was obtained on the basis of such constitutionally defective eyewitness testimony.

– The prosecutor's efforts to overreach for a conviction of Mr. Landano merged neatly with the Breed's efforts to frame him in order to protect the Breed perpetrators.

No conviction should be allowed to stand on such a record.

App. 102 to 104. (Emphasis Supplied)

In the aforesaid brief, Mr. Landano relied upon the Due Process Clause of the Fourteenth Amendment, *Brady v. Maryland*, 373 U.S. 83 (196) and its progeny, and *Simmons v. United States*, 390 U.S. 377 (1968) in analyzing the improprieties with respect to Jacob Roth and Raymond Portas. App. 104; Brief in Support or Verified Petition.

In his initial state pleadings and moving papers, the petitioner provided the state trial court with a sound evidentiary basis for his allegations. He provided an affidavit from Raymond Portas attesting that on April 15, 1977 he had viewed a photographic display at the prosecutor's office and promptly selected a photograph he thought depicted the driver of the getaway car. Someone took that photograph out of the room and he never saw it again. Also, Portas attested that while waiting outside the courtroom just prior to his testimony at trial, someone pointed Mr. Landano out and told him that he was the defendant. But for that coaching Mr. Portas would have been unable to identify Mr. Landano. See, State Verified Petition and Brief.

Also, Mr. Landano provided the state trial court with a transcript of a tape of a lecture prosecutor Mulcahy gave at Kean College in 1981. In his lecture, prosecutor Mulcahy revealed, for the first time that Jacob Roth "was a somewhat uncooperative guy who never wanted to be – didn't want to be bothered". According to Mulcahy, Roth "just didn't want to be involved and *we had to like coerce him* – tell him – you're involved – this is your place – it got ripped off." (Emphasis supplied) App. 179.

Petitioner provided the state post-conviction court with evidence that Jacob Roth had dealings with underworld figure, Anthony Gallagher, a notorious Bayonne loan shark. (Check cashiers are forbidden from consorting with such criminal figures, N.J.S.A. 17:15A-12). Moreover, evidence showed that Jacob Roth was suspected of illegally paying gratuities of Officer Snow in exchange for his money delivery services. In his lecture, prosecutor Mulcahy admitted that during the investigation of the Snow murder he had "looked hard" into Roth's dealings with Gallagher and possible loan sharking and that he

had subjected Roth to "numerous interviews" probing these matters. Just days after Landano was sentenced, Jacob Roth surrendered his check cashing license. App. 178 *et seq.*; State Verified Petition. The State never produced any discovery materials reflecting the aforesaid coercive interviewing. App. 181 to 182.

Despite the substantial evidence presented in petitioner's initial state pleadings and moving papers, the state trial level judge sharply limited the scope of the evidentiary hearings and the scope of discovery.

The state court denied petitioner's request to take a deposition of prosecutor Mulcahy. It denied petitioner's request to inspect the investigative files in the case. The state court accurately characterized petitioner's demand as being for "practically total discovery." JA 163*. The State energetically opposed all such discovery. JA 425, *et seq.*

The state court refused to hold an evidentiary hearing on the coercion of Jacob Roth. JA 163. The court permitted an evidentiary hearing on the Raymond Portas matter, but limited its scope to whether or not Portas was a recanting witness under state law standards. Under New Jersey law, a recantation is ineffective unless it amounts to a credible confession of perjury at the initial trial. *State v. Vaszovich*, 13 N.J. 99, 130 (1953).

During the hearing with respect to Portas issue, the state court indicated that it was unwilling even to entertain federal constitutional issues, *e.g.*, whether Portas' initial photographic selection of someone other than Landano was suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). When petitioner's counsel sought

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*"Joint Appendix" below at 163.

to ask questions about prosecutorial misconduct, the following colloquy occurred:

> The Court: Hold it, Mr. Mullin. We're here now on an Evidentiary Hearing and recanting witness. We're not here to lay a foundation for any [prosecutorial] misconduct in office or practice.
>
> Mr. Mullin: Well, we're on recantation and also the suppression of evidence by the prosecutor as to the influence of that witness by an officer of the prosecutor's office, a detective . . . we have a *Brady* issue . . .
>
> The Court: *I don't see a Brady issue.* This is strictly an Evidentiary Hearing [with respect to recantation].

[Habeas Petition, *Exhibit C*, Transcript of 10/28/82 at 107:10 to 24.] [Emphasis supplied.]

Indeed, in its opinion denying post-conviction relief the state court did not resolve any federal constitutional issues, but determined only that Portas' testimony did not rise to the level of a recantation. JA 164, *et seq.*

In so ruling, the state court declared that it was bound by state law to presume that Portas' testimony was "suspect and untrustworthy." JA 168. The court indicated that in evaluating Portas' testimony, his "power of recall was not the test" *ibid.*, *i.e.*, of little significance. The court concluded that Portas did not offer a classic recantation, he did not say "I lied before" and therefore the court denied relief. JA 167.

Of course, Portas never contended that he lied at trial. He contended that his testimony at trial was the product of suggestive police techniques that he realized were improper immediately after the trial. App. 159, *et seq.*

Plaintiff appealed the denial of post-conviction relief to the state Appellate Division. In his brief to that Court,

he asked for the matter to be remanded for a full evidentiary hearing on the Jacob Roth issue, citing *Pennsylvania v. Claudy*, 350 U.S. 116 (1956) for the proposition that the Fourteenth Amendment requires such a hearing when a state petitioner alleges substantial constitutional violations. Petitioner also presented all of the federal constitutional issues he had presented at the trial level. The Appellate Division affirmed the denial of relief on January 30, 1984 in an unpublished opinion.

Petitioner applied for certification to the New Jersey Supreme Court, again raising all of his federal constitutional claims. Once again, the petitioner alleged that the state had suppressed evidence inculpatory of Forni and exculpatory of him. In Landano's petition for certification to the New Jersey Supreme Court, he argued as follows:

> . . . Mr. Landano has made a very substantial claim of innocence. It emerges from facts surrounding this case that the actual murderer of Officer Snow was a co-defendant, Victor Forni; that the prosecutor was unable to extradite Mr. Forni from New York at a time when the prosecutor's office was under enormous pressure to obtain a conviction for the killing of Police Officer John Snow; and that the prosecution, yielding to such pressure, joined the perpetrators of this crime in framing Mr. Landano as the alleged killer of Officer Snow . . . This case provides an opportunity to give its imprimatur to the Appellate Division's very important ruling in *State v. Thomas* . . . holding that an accumulation of prosecutorial misconduct compels overturning of a defendant's conviction in accordance with the Fourteenth Amendment of the United States Constitution.

App. 104 to 105.

The New Jersey Supreme Court denied certification on June 13, 1984, 97 N.J. 620 (1984).

THE FIRST FEDERAL HABEAS PROCEEDING

On October 10, 1985, petitioner filed a petition for habeas corpus in the United States District Court for the district of New Jersey. The district court ordered some of the discovery that the state court had denied and because some evidence thereby revealed tended to corroborate Portas, the District Court held an evidentiary hearing at which Portas alone testified. App. 156 to 159.

The Court found Portas' testimony credible. The Court found that Portas' initial photographic selection had probably been of Forni and found that the State had concealed that selection. The Court found that Portas had been impermissibly coached by an agent of the state as he waited outside the courtroom. App. 159 to 162. The district court found that the State engaged in "knowing suppression of its investigation" into Roth that "cannot be excused." The Court found that the prosecutor's coercive tactics would have substantially impeached Jacob Roth's testimony had they been revealed to the jury. App. 181 to 182.

The district court found that the State suppressed evidence of Forni's active participation with Roller in similar crimes. The Court found that such evidence would have substantially impeached Roller's testimony and would have affirmatively demonstrated that Roller did not commit crimes with Mr. Landano, but rather with Forni. App. 171, *et seq.*

Notwithstanding the foregoing findings, the district court denied a writ of habeas corpus in an order entered on September 29, 1987. The court reasoned that it was bound under 28 U.S.C. sec. 2254(d) to defer to the adverse state court findings with respect to Portas and to

disregard its own findings with respect to Portas. Accordingly, although Roth and Roller were discredited, a residuum of evidence remained that would support the conviction and render the Roth and Roller evidence nonmaterial. The court reasoned that Joseph Pascuitti's testimony placed the killer in the driver's seat of the getaway car and Raymond Portas identified the driver as Mr. Landano. App. 182 to 183.

The district court denied a motion for reconsideration on December 22, 1987. *Landano v. Rafferty*, 675 F. Supp. 204 (D.N.O. 1987), the Third Circuit affirmed, *Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988). This Court denied certiorari, *Landano v. Rafferty* ___ U.S. ___, 109 S. Ct. 1127 (1989).

THE SECOND FEDERAL HABEAS PROCEEDING

Shortly after this Court's denial of certiorari, petitioner discovered previously suppressed identification evidence inculpatory of Forni. Specifically, petitioner discovered a Kearny police report indicating that a hitherto unknown witness, Joseph Basapas, selected Victor Forni's photograph as depicting the driver of the getaway car from an array of 17 photographs that included 2 photographs of Mr. Landano. (Hereinafter referred to as the "Basapas Report") App. 126, *et seq.*

Based on that document, petitioner obtained an *ex parte* order from the district court seizing all police and prosecutive files pertaining to the investigation of the murder of Officer Snow. Upon inspection of those files, petitioner found another document implying that various eyewitnesses including Pascuitti had, in a police interview, been shown a single photograph of Mr. Landano and ruled him out as a suspect in the killing because he

did not physically match the killer. (Hereinafter referred to as the "ID on Landano" document.) App. 117, *et seq.*

Various other items of exculpatory evidence were found including, *inter alia*, an empty prosecutor's envelope that apparently had once contained suspect photographs bearing the notation "Forni looks like guy who drove car down street" and a report of an interview with Jacob Roth conducted the very day of his alleged positive identification of Mr. Landano undertaken at the Internal Affairs Office of the Newark Police Department inquiring of Roth whether he had, during the preceding years, illegally paid gratuities to Officer Snow. App. 136; JA 825.

The district court found that the newly discovered evidence would have directly impeached Portas' trial testimony that petitioner drove the getaway car. Taken with the other evidence concerning Roth and Roller, the district court found the new evidence material and issued a writ of habeas corpus. Moreover, the district court made the following finding that the State had engaged in a systematic pattern of bad faith suppression of exculpatory evidence:

> PROSECUTORIAL BAD FAITH
>
> At Landano's trial, the prosecution relied on the testimony of four crucial witnesses: Jacob Roth, Allen Roller, Raymond Portas, and Joseph Pascuitti. The court has already concluded in its prior opinion that (1) a State agent involved in the prosecution of Landano made an impermissibly suggestive statement to Raymond Portas prior to his courtroom testimony; (2) the prosecutor suppressed information about co-defendant Allen Roller's additional criminal activities; and (3) the prosecutor suppressed information concerning a police investigation of

> Jacob Roth's business dealings. 670 F. Supp. at 577-588. In other words, this court has already determined that the prosecution either committed affirmative acts of misconduct or breached its *Brady* obligation with respect to three of the State's four key witnesses against Landano. In the instant application, it is further disclosed that the prosecutor did not turn over a police report which could have further impeached Roth, or a Hudson County Prosecutor envelope which memorializes an apparent eyewitness identification of Forni as the getaway car driver. (Mullin Cert., Exhibits E, I). There is no question that the record in this matter exposes a pattern of failures by the prosecution in this case to live up to its good faith duty to turn over exculpatory information. This pattern supports the position asserted by Landano from the outset that the prosecution suppressed evidence exculpatory to him and inculpatory of Forni. Although the court recognizes that the good or bad faith of the prosecutor is irrelevant with respect to *Brady* due process analysis, *see Brady*, 373 U.S. at 87, such considerations certainly are relevant to the credibility of the government's response to Landano's claims of suppression of particular items of evidence . . .

App. 116 to 117.

THE THIRD CIRCUIT'S REVERSAL

On February 27, 1990, the Court of Appeals for the Third Circuit reversed the district court's grant of the writ of habeas corpus. In so ruling, the court held that Mr. Landano had failed to exhaust state remedies in that he did not present to the state courts the two pieces of documentary evidence that were central to district court ruling, the Basapas Report and the "ID on Landano" document. The panel majority did not disturb the district

court's finding that the state had suppressed evidence intentionally and in bad faith but held that such conduct did not constructively waive the defense of non-exhaustion. App. 33 to 34. Circuit Judge Max Rosenn dissented and urged the court to adopt an Eighth Circuit rule set forth in *Austin v. Swenson*, 522 F.2d 168, (8th Cir. 1975) holding that a habeas petitioner raising *Brady* claims need not return to state court every time he discovers new previously suppressed exculpatory evidence provided the same type of evidence formed the basis of a *Brady* claim in state court. App. 39, *et seq.*

On April 3, 1990, the Third Circuit denied rehearing in banc. Chief Judge Higginbotham, as well as Judges Stapleton and Becker dissented. Judge Rosenn did not vote on the petition for rehearing because of his senior status. App. 69 to 71.

On April 16, 1990, the Third Circuit issued an order staying the mandate until May 3, 1990 and continuing thereafter, provided a petition for certiorari was filed on or before that date. App. 72 to 73.

REASONS FOR GRANTING THE PETITION

POINT I

THE THIRD CIRCUIT, DEVIATING FROM THIS COURT'S RULINGS AND CREATING A SPLIT OF AUTHORITY IN THE CIRCUITS, ERRED BY REQUIRING A HABEAS PETITIONER TO PRESENT TO THE STATE COURTS THE FACTUAL PREDICATE OF *BRADY* CLAIMS WITH THE SAME DEGREE OF SPECIFICITY AS REQUIRED OF OTHER CLAIMS ARISING FROM FACTS REASONABLY KNOWN TO A PETITIONER.

Throughout state proceedings, Mr. Landano has insisted that the State, in violation of *Brady v. Maryland*, 373

U.S. 83 (1963), suppressed eyewitness identification statements inculpatory of Forni, the individual who likely killed Officer Snow, and exculpatory of Mr. Landano. Statement of the case at 9 to 15. Shortly after this Court denied certiorari, *Landano v. Rafferty* ___ U.S. ___, 109 S. Ct. 1127 (1989), Mr. Landano discovered two documents, hitherto suppressed by the State, recording eyewitness statements inculpatory of Forni and exculpatory of Mr. Landano. Even though those documents simply substantiated the *Brady* claim petitioner had already presented to the state courts, the Third Circuit ordered a writ of habeas corpus vacated on grounds that petitioner had failed to exhaust state remedies because he had not presented the two newly discovered documents to the state courts. In so ruling, the Circuit held that in order to satisfy the exhaustion requirement, a "habeas petitioner [must] provide the state courts with both the same legal theory *and the same factual predicate* underlying the constitutional argument . . . " as subsequently presented to the federal courts. App. 22 (emphasis supplied).

This Court has never held that the exhaustion doctrine requires presentation of the *same* factual predicate to state and federal courts. To the contrary, this Court, while requiring a substantial identity of the *legal* issues presented in state and federal court, *Picard v. Connor*, 404 U.S. 270, 275-277 (1971), has allowed the presentation of newly discovered evidence to a federal habeas court provided that such facts do "not fundamentally alter the legal claim already considered by the state courts," *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). This Court has "never held that presentation of additional facts to the district court, pursuant to that court's directions, evades

the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." *Id.* 474 U.S. at 257-258.

Thus there is a stark contrast between this Court's 'fundamental alteration' test and the Third Circuit's "same factual predicate" standard.

As noted by Circuit Judge Rosenn in his dissent, App. 39 *et seq*, it is particularly inefficient and inappropriate to halt federal proceedings and to require a petitioner to return to state court every time he discovers new documentary evidence, hitherto suppressed by the State, that substantiates a *Brady* claim previously raised in state court. It is the very nature of a *Brady* claim that its factual predicate is not fully known to a petitioner because the State, innocently or intentionally, has suppressed the factual predicate. As Judge Rosenn states:

> Forcing a *Brady* claimant back to state court each and every time he finds new evidence that the state has withheld is in effect like allowing the state to remove a man's eyeglasses and then penalizing him for his impaired vision.

App. 52.

Judge Rosenn proposes adoption of an Eighth Circuit rule set forth in *Austin v. Swenson*, 522 F.2d 168 (8th Cir. 1975) *aff'd after remand* 538 F.2d 443 (8th Cir. 1976), which, unlike the Third Circuit rule is fully consonant with the holding of *Vasquez v. Hillery, supra*:

> Thus, I would join the Court of Appeals for the Eighth Circuit in formulating a rule, which would hold *Brady* claims based upon new evidence exhausted as long as the petitioner had previously made a *Brady* claim in the state court based upon evidence of similar importance and effect. (3) As that court of appeals held, "Absent a willful withholding of evidence by the defendant in the state proceeding, the requirement of

exhaustion does not preclude the District Court from entertaining the issue previously raised in state court and deciding the habeas claim upon the basis of new evidence." *Austin v. Swenson*, 522 F.2d at 170.

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3. The petitioner must have based his state court *Brady* claim upon more than mere allegations: he must have been able to substantiate it with some evidence. See *Wise v. Warden*, 839 F.2d 1030 (4th Cir. 1988); *Sampson v. Love*, 782 F.2d 53 (6th Cir.), *cert. denied*, 479 U.S. 844 (1986); *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 94 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978).

The new evidence should have similar impact upon the case. For instance it would not constitute exhaustion if petitioner raised a *Brady* claim based upon the withholding of evidence relevant to the voluntariness of his confession, and later presented a claim based upon withheld evidence regarding identifications. Here, Landano's new evidence had two effects, undermining identifications of Landano and implicating Forni. The withheld evidence relating to Portas, Roller, and Roth, all of which was presented to state tribunals, had similar effects.

App. 53 to 54.

In order to resolve the split of authority between the Third and Eighth Circuits and in order to remedy the Third Circuit's deviation from this Court's rulings in *Vasquez*, *supra*, certiorari should be granted. The new facts here did not "fundamentally alter", *id.*, the legal claims presented to the state court. Accordingly, the Third Circuit's judgment ultimately should be reversed.[1]

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[1] In ruling against the petitioner, the Third Circuit relied almost exclusively upon exhaustion cases involving claims of

(Continued on following page)

POINT II

THE COURT BELOW IMPROPERLY DECIDED AN IMPORTANT AND NOVEL ISSUE, TO WIT, WHETHER A PROSECUTOR WHO THWARTS EXHAUSTION OF STATE REMEDIES BY ENGAGING IN A SYSTEMATIC PATTERN OF BAD FAITH SUPPRESSION OF EXCULPATORY EVIDENCE SHOULD BE DEEMED CONSTRUCTIVELY TO HAVE WAIVED A NON-EXHAUSTION DEFENSE.

The reason the documentary evidence involved here was not originally presented to the state courts is because the state engaged in a bad faith pattern of systematic suppression of exculpatory evidence. App. 116 to 117. Several copies of the Basapas Report were found in the trial prosecutor's files. App. 126. A handwritten note referring to Basapas' identification of Forni was found in the litigation file of the deputy attorney general handling this case. JA 811. The "ID on Landano" document was found in the files of the Kearny Police Department, an entity that worked closely with the prosecutor's office in the investigation and trial of this matter. App. 117. Put another way, if there was non-exhaustion here – and petitioner insists that he *did* exhaust state remedies – the State intentionally and in bad faith caused such non-

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(Continued from previous page)

involuntary confessions, incompetence of counsel, or improper trial statements by a prosecutor arising from facts fully known to the petitioner while he was in state court. See cases cited at App. 21 to 29. As discussed above, it is impossible for a petitioner to raise *Brady* issues with the same fullness and specificity as is possible with the foregoing types of claims if, as here, the prosecutor is still suppressing evidence while the matter is pending in the state courts.

exhaustion by obstructing the presentation of documentary evidence to the state courts.

The Third Circuit did not reach and therefore did not disturb the district court's finding that the State engaged in bad faith suppression here. App. 33 to 34. Rather, it explicitly held that even when the State intentionally thwarts exhaustion by engaging in "systemic, bad faith suppression of exculpatory evidence" nevertheless the State may raise and benefit from the defense of non-exhaustion. *Ibid.*

The issue posed here is novel, but the result sought here has substantial grounding in this Court's prior decisions.

This Court has held that the non-exhaustion defense is waivable. In *Granberry v. Greer*, 481 U.S. 129 (1987), this Court reversed a Seventh Circuit decision which had held the non-exhaustion defense to be unwaivable. There, the State inadvertently failed to raise a non-exhaustion defense in the district court and raised it for the first time on appeal. *Id.* at 132 n.5 and text. This Court ruled that a federal appellate court, in deciding whether or not to deem the failure to raise non-exhaustion a waiver of that defense, "should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim." *Id.* at 134.

Obviously, the interests of comity and federalism will *not* be served by dismissing the petition and thereby rewarding the State for intentionally thwarting presentation of exculpatory documentary evidence to the state courts. Such an approach will not only undermine the interests of comity and federalism, but also will reward

unconstitutional suppression of exculpatory evidence, thereby undermining the policy imperatives of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

This Court has used the doctrine of constructive waiver to deter habeas *petitioners* from suppressing evidence in federal proceedings in order to achieve a strategic advantage by bringing such evidence forward only after failing at an initial federal hearing. In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court warned habeas petitioners that if they deliberately withheld grounds for federal relief from their initial federal habeas petition in hopes of having a second federal petition and a second hearing they "may be *deemed to have waived [their] right to a hearing* on a second application presenting the withheld ground." *Rose, supra*, 455 U.S. at 521, quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963). (emphasis supplied) If by withholding evidence petitioners may be deemed to have waived their right to a hearing, the State should be "deemed to have waived," *Rose, supra*, its non-exhaustion defense when it has in bad faith concealed evidence.

This Court has never hesitated to impose substantial procedural sanctions on the State when it in bad faith violates the constitutional rights of criminal defendants. This Court has countenanced the exclusion of inculpatory evidence in order to deter governmental misconduct. *United States v. Leon*, 468 U.S. 897 (1984). Surely, constructive waiver of a non-exhaustion defense, which unlike the exclusionary rule does not have the capacity to free the guilty, is a relatively small price for the State to pay for bad faith suppression of evidence that demonstrates a person's innocence.

Certiorari should be granted to establish a rule deeming the non-exhaustion defense constructively waived

where, as here, the State has caused non-exhaustion through bad faith suppression of evidence.

POINT III

A WRIT OF HABEAS CORPUS SHOULD ISSUE WHERE, AS HERE, THE COURT INVADES THE PROVINCE OF THE JURY BY DISREGARDING ITS VERDICT AND ISSUING A COERCIVE SUPPLEMENTAL CHARGE IN VIOLATION OF THE SIXTH AMENDMENT.

Under New Jersey law, a criminal defendant may not be convicted except by the unanimous decision of a twelve member jury. *State v. Reynolds*, 41 N.J. 163, 187 (1963); *State v. Cordasco*, 2 N.J. 189, 202 (1949); See also *State v. Trent*, 79 N.J. 251 (1979).

While the Sixth Amendment of the United States Constitution may not compel states to require unanimous verdicts where petit juries consist of twelve persons, *Apodaca v. Oregon*, 406 U.S. 404 (1972), *Johnson v. Louisiana*, 406 U.S. 356 (1972), *Burch v. Louisiana*, 441 U.S. 131, 138 n.11 (1979), clearly, when state law mandates such unanimity, a state court may not, consistently with the Sixth Amendment as applied to the states through the Fourteenth Amendment, deprive a defendant of that entitlement.

It is inevitable in a system that requires unanimity that there are three possible outcomes in a criminal trial: conviction, acquittal or no verdict. Under such a system, if a jury cannot reach unanimity, then, the defendant is entitled to a mistrial. The state, in turn, is entitled to retry the defendant.

Here, defendant's right to the no-verdict outcome was violated. The jury unambiguously expressed that outcome by handing the judge a note reading:

> We honestly feel we cannot get a twelve vote count on guilty or not guilty. We tried on all eight counts. We can't say twelve to zero guilty or not guilty.

App. 185 to 186.

Instead of accepting the jury's unambiguous verdict, the state court gave a charge that commissioned the jury to consider matters extraneous to the case, *e.g.*, the "time and expense" involved in Mr. Landano's trial, the inevitability of retrial, and the 'fact' that no new evidence would ever be uncovered clarifying Landano culpability. App. 186.

Of course it was not true that "this case must at a future time be decided" by a "future jury". App. 186. The prosecutor could have decided not to retry the matter. Nor was it true that "clearer evidence" would not "ever be produced". App. 186. Indeed this habeas petition is testimony to the falsity of that assertion.

The overall impact of the charge was to coerce holdout jurors by suggesting they would inevitably cause an expensive retrial with identical evidence. Those jurors then had to consider not the evidence against Landano, but the cost retrial posed to the taxpayers.

This Court has never yet ruled on the constitutionality of a charge such as this. In *Jenkins v. United States*, 380 U.S. 445 (1965), however, this Court, acting in its supervisory capacity, condemned a supplemental charge where, as here, the jury indicated its inability to reach a verdict and the court, as here, misleadingly told the jury that if the court "excuse[d] [the jury] we have to try the case again with some other jury . . . " See *Jenkins v. United States*, 330 F.2d 220, 211 n.2 (D.C. Ct. of App. 1964).

Jenkins, supra, still has vitality, *Lowenfield v. Phelps*, ___ U.S. ___, 108 S. Ct. 546, 550-51 (1988). This case

provides an opportunity for this Court, for the first time, to address the constitutional dimensions of coercive supplemental charges.

The courts below concluded that the coercive aspects of the charge were somehow mitigated by other aspects of the charge that were appropriately worded. App. 187 to 188. In so ruling neither court below evaluated the charge in context. After two days of deliberation and an intervening week-end, the jury decided it "honestly felt" it could not reach a verdict. Fifty-three minutes after the supplemental charge, the jury was unanimous on eight counts. Obviously, then, the charge had coercive impact. Moving at the rate of six minutes per count, the jury convicted the petitioner.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 27, 1990

TO: Carol M. Henderson, Esq.

(Neil M. Mullin, Esq.
(Nancy Erika Smith, Esq.

Richard W. Berg, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case Nos 89-5504, and copies are enclosed herewith. 89-5625 and 89-5638

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

Filing Time

A petition may be filed within 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The petition must be *received* in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, the petition shall contain, so far as is pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the

> Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],
>
> Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

Counsel is reminded that sanctions may be imposed for the filing of a frivolous petition for rehearing. *See* Fed. R. App. P. 46(c).

Form

The 15 page limit allowed by the Rule shall be observed.

Number of Copies

An original and 14 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Rule 22.1

Attachments

Attach to each petition for rehearing a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be *received* in the Clerk's office within the 14 day period.

Form

Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if parties intend to file a petition for writ of certiorari to the Supreme Court of the United States.

Sally Mrvos, Clerk

Enclosures

Rev. 5/86

App. 5

Filed: February 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5504, 89-5625 & 89-5638

VINCENT JAMES LANDANO,
Respondent

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, (East Jersey State Prison), PETER PERRETTI, (Attorney General, State of New Jersey), LESLIE FAY SCHWARTZ, (Deputy Attorney General), THE OFFICE OF THE HUDSON COUNTY PROSECUTOR, KEARNEY POLICE DEPARTMENT, NEWARK POLICE DEPARTMENT, JERSEY CITY POLICE DEPARTMENT and PERTH AMBOY POLICE DEPARTMENT,

Petitioners No. 89-5504

HONORABLE H. LEE SAROKIN,
U.S. DISTRICT COURT JUDGE,

Nominal Respondent

VINCENT JAMES LANDANO

vs.

JOHN J. RAFFERTY, Superintendent,
Rahway State Prison,
and
IRWIN I. KIMMELMAN, Attorney
General of the State of New Jersey

VINCENT JAMES LANDANO

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, (East

Jersey State Prison), PETER PERRETTI, (Attorney General, State of New Jersey), LESLIE FAY SCHWARTZ, (Deputy Attorney General), THE OFFICE OF THE HUDSON COUNTY PROSECUTOR, KEARNEY POLICE DEPARTMENT, NEWARK POLICE DEPARTMENT, JERSEY CITY POLICE DEPARTMENT and PERTH AMBOY POLICE DEPARTMENT

John J. Rafferty, Superintendent, East Jersey State Prison, and Peter N. Perretti, Jr., Attorney General of New Jersey,
Appellants No. 89-5625 & 89-5638

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil Nos. 85-4777 & 89-2454)

Argued December 12, 1989

Before: HUTCHINSON, COWEN and ROSENN
Circuit Judges
(Filed February 27, 1990)

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

The various appellants-petitioners in this action, whom we will refer to collectively as "the State of New Jersey," appeal an order of the district court conditionally granting the petition of Vincent James Landano ("Landano") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982). The writ was issued incident to Landano's successful motion under Fed. R. Civ. P. 60(b) for relief from an earlier judgment of the district court denying his petition. Landano's 60(b) motion, which in effect renewed his initial petition and raised additional claims, was premised on alleged prosecutorial fraud. Because we find that Landano has not satisfied the exhaustion requirement of section 2254 with respect to certain additional claims he has raised in his 60(b) motion, we will reverse the district court's order granting the conditional writ, and remand with directions to dismiss the petition and vacate all orders entered subsequent to the court's initial order denying Landano's petition.

I.

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearney, New Jersey ("the Kearney robbery").[1] During the robbery, one of the gunmen shot and killed a Newark police officer. A Hudson County grand jury indicted Landano and three other men, Allen Roller ("Roller"), Victor Forni ("Forni") and Bruce Reen ("Reen"), for felony murder and other crimes stemming from the robbery. The trial of Forni and Reen was severed from that of Landano and Roller. However, prior to the commencement of the Landano and Roller trial, and pursuant to a plea agreement with the prosecutor, Roller pled *non vult* to the felony murder charge and testified against Landano.

Evidence at Landano's trial showed that the Kearney robbery was the work of a motorcycle gang known as "The Breed." According to the testimony of Breed members and affiliates, the gang frequently planned and executed armed robberies in the Staten Island area. The evidence also revealed that Roller, the president of The Breed's Staten Island chapter, and Forni, who was not a Breed member but reputedly responsible for organizing most of The Breed's criminal activities, conceived of the plan to rob the Hi-Way Check Cashing Service.

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[1] This account of the underlying crime and the subsequent trial proceedings is summarized from prior opinions of this Court and the United States District Court for the District of New Jersey. *See Landano v. Rafferty*, 670 F. Supp. 570, 573-75 (D.N.J. 1987), *aff'd*, 856 F.2d 569, 570-71 (3d Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1127 (1989).

It was undisputed that Landano was neither a Breed member nor affiliate. However, Roller testified that Landano was specifically recruited for the Kearney job because he was a friend of Forni. Roller insisted at trial that although Forni had orchestrated the robbery, Forni did not participate in the actual execution of the crime.

According to the testimony at the trial, two men arrived at the Hi-Way Check Cashing Service in the early morning hours of August 13. One of the perpetrators entered the Service's trailer/office, while the other remained outside. During the robbery, Officer John Snow pulled into the parking lot in his patrol car. The perpetrator who had remained outside walked up to the patrol car and shot Officer Snow at close range, killing him. The two perpetrators then sped off in a green Chevrolet.

Landano was linked to the crime through the testimony of several witnesses. Roller testified that he and Landano were the perpetrators and that he was the individual who had entered the trailer while Landano remained outside. Roller also told the court that Landano informed him later that he had to "ice" or "waste" the police officer.

Jacob Roth ("Roth"), the owner of Hi-Way Check Cashing Service, also identified Landano as a participant in the robbery, but Roth testified that Landano had been the individual who entered the trailer, not the one who remained outside. In addition, Roth was able to observe the license plate of the automobile used by the perpetrators.

Joseph Pascuiti ("Pascuiti"), an employee of an adjacent warehouse, testified that he observed from his workplace window a dark haired man approach Officer Snow's patrol car. However, Pascuiti then turned away from the window. When he heard gunshots and again focused his attention on the parking lot, Pascuiti saw a green Chevrolet, driven by the same dark haired man who had approached the patrol car, pulling hurriedly out of the parking lot. Pascuiti was unable to identify the dark haired man as Landano.

In attempting to escape from the crime scene, the perpetrators came upon a blocked intersection. The efforts of the driver to maneuver through the traffic attracted the attention of Raymond Portas ("Portas"), a truckdriver sitting in the stalled traffic. Portas testified that he saw a green Chevrolet pull out of the line of traffic and proceed along adjacent railroad tracks. Portas' description of the license plate number matched Roth's. At trial, Portas was able to identify Landano as the driver of the car. Furthermore, Portas stated that he had also picked Landano's photograph out of an array shown to him at a pre-trial identification session.

Thus, the evidence at Landano's trial linking him to the crime included: Roller's testimony naming Landano as his partner; Roth's identification of Landano as the participant who entered the trailer; Pascuiti's testimony that the killer of Officer Snow was the driver of the green Chevrolet; and Portas' testimony that the driver of the green Chevrolet was Landano. After approximately two days of deliberations, the jury informed the court that it was unable to reach a unanimous verdict on any of the submitted counts. At that point, the court delivered a

supplemental charge and ordered the jurors to continue their deliberations. One hour later the jury returned a verdict finding Landano guilty on all counts. On May 17, 1977, Landano was sentenced to life imprisonment on the felony murder count and a consecutive term of seven to fifteen years on the remaining counts.

Landano filed a Notice of Appeal on June 29, 1977. On September 26, 1978, Landano also filed a motion in the Superior Court of New Jersey, Appellate Division, seeking remand to the trial court for consideration of his motion for a new trial. The motion was based on three grounds: (1) Roller's alleged prison recantation in which he allegedly told two other prisoners that he had committed the Kearney robbery with someone other than Landano; (2) newly discovered evidence allegedly linking Forni to a Jersey City robbery that Roller had admitted committing at Landano's trial, but with someone other than Forni; (3) and a *Brady*[2] claim alleging that the prosecutor had suppressed evidence possibly linking Roller, Forni and Reen to one or two Perth Amboy robberies occurring sometime prior to the Kearney holdup.

An order granting Landano's motion was entered on October 17, 1978. Three days of evidentiary hearings were then held by the trial court, after which Landano's motion was denied. The Appellate Division subsequently

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963). For simplicity, throughout this Opinion we use the generic term "*Brady* claim" to refer to Landano's various claims involving State suppression of exculpatory evidence including claims of suppression of impeachment evidence under *Giglio v. United States*, 405 U.S. 150, 154 (1972).

both denied Landano's direct appeal and affirmed the trial court's denial of his motion for a new trial. Landano's petition for certification was denied by the New Jersey Supreme Court.

On March 31, 1982, Landano filed a petition for post-conviction relief. According to Landano, the issues raised in this petition were the following:

> (1) Whether [the trial court's] "Allen" charge[3] required vacation of the conviction.
> (2) Whether newly discovered evidence as to [the] coercion of . . . Roth in obtaining identification testimony against Landano required vacation of the conviction.
> (3) Whether newly discovered evidence that the prosecutor had coached . . . Portas in obtaining his photographic and in-court identification of . . . Landano required vacation of the conviction.
> (4) Whether newly discovered evidence that the State had concealed [Officer] Snow's connection to . . . Roller and that . . . Roller had perjured himself at trial about such connection required vacation of the conviction.
> (5) Whether the sheer accumulation of prosecutorial misconduct compels the overturning of . . . Landano's conviction . . . [4]
> [(6)] Whether the State's loss or destruction of two photographs of the display shown . . .

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[3] *Allen v. United States*, 164 U.S. 492 (1896).

[4] Issue (5) was based on alleged prosecutorial misconduct in coercing the testimony of Roth, destroying relevant photographs, and parading a handcuffed Landano in front of Portas immediately prior to his trial testimony and in-court identification.

> Portas in obtaining an identification of . . . Landano required vacation of the conviction. [(7)] Whether the State's failure to sequester . . . Portas so that he could not view the defendant as he was led into the trial court just prior to Portas' in-court identification testimony unduly tainted Portas' identification and otherwise deprived defendant of a fair trial.

App. at 484 (Landano's Brief in Support of his appeal of the trial court's denial of his petition for post-conviction relief). Issues (3), (6) and (7) arose out of Portas' recantation of his trial testimony. As part of his recantation, Portas has stated under oath that when he was asked initially to identify the driver of the getaway car he selected someone other than Landano from the array and that only later, after the police had removed the selected photograph and told him to continue looking at the array, did he tentatively identify Landano as resembling the driver. In addition, Portas has stated that he did not recognize Landano when Landano and his attorney walked past him in the courthouse hallway prior to Portas' in-court identification until a police officer told him immediately after the encounter that one of the two men was "our man."

The trial court conducted evidentiary hearings pursuant to this petition. Thereafter, the court issued a series of letter opinions, ultimately denying Landano's requested relief. The court's decision was based primarily on its finding that Portas' recantation was incredible. On January 30, 1984, the Appellate Division denied Landano's appeal, and on June 13, 1984, the Supreme Court of New Jersey denied certification. The issues raised by Landano in the Appellate Division and in his petition for

certification to the New Jersey Supreme Court were substantially the same as those raised in the trial court.

On October 10, 1985, Landano filed a petition for a writ of habeas corpus in federal court.

> As grounds for relief [Landano] allege[d]: (1) that his due process rights to a fair trial were infringed by the admission of . . . Portas' identification testimony; (2) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of codefendant . . . Roller; (3) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of . . . Roth . . . ; (4) [and] that the state court's coercive charge to the jury violated [Landano's] Sixth Amendment right to an impartial jury.

Landano v. Rafferty, 670 F. Supp. 570, 573 (D.N.J. 1997), *aff'd*, 856 F.2d 569 (3d Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1127 (1989). These four claims had all been properly exhausted in the state proceedings initiated by Landano. After holding its own evidentiary hearing on issue (1), the district court found that Portas' recantation was credible. However, the court recognized that it was bound by the prior credibility finding of the state trial court and, therefore, found no due process violation as a result of the admission of Portas' identification. Moreover, the court found that although relevant impeachment evidence of both Roller and Roth had been suppressed by the State, such information was not material in light of Pascuiti's trial testimony linking the killer of Officer Snow to the driver of the getaway car and Portas' identification of Landano as that driver. *Id.* at

585-88.[5] The district court reluctantly denied the petition. This Court affirmed, *Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988), and the United States Supreme Court denied *certiorari*, *Landano v. Rafferty*, ___ U.S. ___, 109 S. Ct. 1127 (1989).

On June 7, 1989, Landano filed with the district court a motion to reopen the previous habeas proceeding, pursuant to Fed. R. Civ. P. 60(b), and an *ex parte* application for a temporary restraining order. The motion requested the court to vacate the prior judgment because of fraud on the part of the prosecution. Specifically, Landano alleged that state investigation reports, recently obtained by Landano's own investigator, revealed that the prosecution had intentionally suppressed information that at least two witnesses had identified Forni as the driver of the getaway car. Landano sought relief in the form of an order to show cause why a writ of habeas corpus should not issue, and a temporary restraining order directing that the United States Marshal seize all files pertaining to the Kearney robbery maintained by the New Jersey Attorney General, the Hudson County Prosecutor, and several police departments.

The *ex parte* application for a temporary restraining order was granted by the district court on June 8, 1989, and Landano's counsel thereafter reviewed all of the files, except for portions that the State of New Jersey claimed were protected by work product privilege or confidentiality. At a hearing on June 14, the State presented the

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[5] The district court also found that the state trial court's *Allen* charge did not violate Landano's sixth amendment or due process rights.

district court with a list of items deemed privileged or confidential. After reviewing these documents *in camera*, the district court granted in part and denied in part the State's claims.

On June 28, 1989, the district court filed an order to show cause why a writ of habeas corpus should not issue. After taking submissions from the parties and hearing oral argument, the district court, on July 27, 1989, vacated its earlier order denying Landano's petition and issued a conditional writ of habeas corpus requiring that the State of New Jersey release Landano unless a new trial is commenced within 90 days.[6] The basis for the district court's reversal of its previous decision was the discovery by Landano's counsel of two allegedly suppressed and exculpatory documents in the State's files.[7] The first document was a handwritten sheet of paper labeled "ID

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[6] Although finding no fraud on the prosecutor's part, the district court reopened the case because of exceptional circumstances under subsection (6) of Rule 60(b). In resolving the merits of Landano's *Brady* claims, the district court did not hold evidentiary hearings.

[7] Landano also raised other claims in the district court in connection with his 60(b) motion, however, none are at issue in this appeal. The district court found that "none [of these additional claims] serve[s] as an independent basis for this court to void Landano's conviction on constitutional grounds." *Landano v. Rafferty*, 126 F.R.D. 627, 654 n.13 (D.N.J. 1989). Landano has not appealed his holding. Thus, even assuming that these additional claims have been exhausted and that the 60(b) motion was properly granted, our decision that two of Landano's *Brady* claims are unexhausted does not require us to remand this case to the district court and permit Landano to waive the non-exhausted claims. *Cf. Dooley v. Petsock*, 816 F.2d 885, 888 n.1 (3d Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 182 (1987).

on Landano" allegedly containing information that several witnesses were suggestively shown a single photograph of Landano but even so rejected it as being a likeness of one of the perpetrators. Significantly, one of the witnesses identified in the document is Pascuiti, a key witness for the State. The second document is a Kearney Police Continuation Report containing an apparent identification of Forni as the driver of the getaway car by an eyewitness named "Joseph Pasapas."[8]

After finding that both of these documents had indeed been suppressed, the district court determined that the information contained in both of the documents was also material. Importantly, the court's materiality analysis of the "ID on Landano" document required a simultaneous re-evaluation of its earlier analysis of the suppression claims raised in Landano's initial habeas corpus petition:

> The court prefaces its discussion of the materiality of the [handwritten "ID on Landano" document] by noting that consideration of the case against Landano "as a whole" necessarily includes the court's conclusions in *Landano*, 670 F. Supp. at 585, 588, regarding the suppression of evidence which could have impeached the testimony of Roller and Roth at trial.
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[8] It is unclear from the Kearney Police Continuation Report whether the name of the witness is "Joseph Pasapas" or "Joseph Basapas." At any rate, both sides agree that there is no individual by that name who has anything to do with this case, and thus the name must be misspelled. However, the parties disagree on who the actual witness really is.

> The evidence at trial linking Landano to the crime consisted of the testimony of Portas . . . and the testimony of Roller and Roth. In its prior opinion, the court held that the suppression of evidence which impeached the testimony of Roller and Roth was not material in light of the other evidence linking Landano to the murder. That "other evidence" is now called into question, and thus the court's materiality determination regarding the suppression of impeachment evidence against Roller and Roth must also be reevaluated. Such impeachment evidence becomes material when considered in light of facts indicating that Pascuiti, the State's only witness to the shooting, may have ruled out Landano as the murderer.

Landano v. Rafferty, 126 F.R.D. 627, 648-49 (D.N.J. 1989). The court argued that had the defense been apprised of the "ID on Landano" document, they could have used it to argue to the jury that Pascuiti had already ruled out Landano as the killer of Officer Snow. If the jury accepted this argument, then the State's case unravels:

> In its prior opinion, this court noted that two witnesses testified that the killer of Officer Snow was also the driver of the getaway car. The prosecutor has already been found to have suppressed *Brady* material with respect to . . . Roller, one of those two witnesses. The court could not find a *Brady* violation, however, because there was a second witness, Pascuiti, who testified that the killer and driver were one and the same, and a third witness, Portas, who had identified Landano as the driver. Now, the record supports an inference that the prosecutor suppressed *Brady* material with respect to Pascuiti's negative identification of Landano which, in turn, calls into question the credibility of Portas' identification.

Id. at 649.

The court gave a similar analysis for the "Joseph Pasapas" identification contained in the Kearney Police Continuation Report. If the person misnamed "Joseph Pasapas" is really Joseph Pascuiti, as the State contends, then had the defense known of this identification they could have rebutted Pascuiti's redirect trial testimony to the effect that he had never selected a photograph of Forni as resembling the driver of the green Chevrolet. Alternatively, if "Joseph Pasapas" is actually Gus Lapas, the owner of a coffee truck usually parked in the area near the Hi-Way Check Cashing Service, as Landano suggests, then such testimony at trial would have directly rebutted Portas' testimony that Landano was the driver of the getaway car. The district court concluded that under either theory there was a reasonable probability that had the information been turned over to the defense, the outcome of the trial would have been different. *Id.* at 653. After issuing its conditional writ, the district court entered an order on July 28 denying the State's motion for both a stay of the conditional writ and for release of its files.

The State of New Jersey now appeals the district court's order granting the conditional writ. The appeal of the conditional writ (No. 89-5638) has been consolidated with the State's petition for mandamus seeking an order that all documents seized pursuant to the district court's temporary restraining order of June 8 be returned to the State (No. 89-5625), and its appeal of the district court's denial of its claims of work product privilege and confidentiality (No. 89-5504).[9] This Court has jurisdiction

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[9] The district court's order denying the privilege and confidentiality claims had been stayed by this Court pending the

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pursuant to 28 U.S.C. § 2253 (1982) and 28 U.S.C. § 1291 (1982).

II.

The first issue we confront in our consideration of the State's appeal is that of exhaustion. Title 28 U.S.C. § 2254(c) (1982) requires a habeas petitioner to exhaust available state remedies before filing an action in federal court: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Moreover, this exhaustion requirement is applicable to new claims a habeas petitioner may raise in seeking relief from a final order under Fed. R. Civ. P. 60(b).[10] *Pitchess v. Davis*, 421 U.S. 482, 489-490 (1975).

This Court has recognized that the exhaustion requirement is not jurisdictional, but arises rather from interests of comity between the state and federal systems. *See, e.g., Bond v. Fulcomer*, 864 F.2d 306, 309 (3d Cir. 1989). Nevertheless, we have held that the requirement should

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disposition of the mandamus petition. On August 29, 1989, this Court also stayed the conditional writ.

[10] Thus, because of our holding on the exhaustion issue we do not reach the question of whether the district court erred in reopening the habeas proceeding under Rule 60(b)(6), although we find that issue problematic as well. Likewise, we do not reach the State's arguments either on the merits of Landano's *Brady* claims or on whether an evidentiary hearing was required.

be strictly adhered to because it expresses respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions. *See, e.g., United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 95 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978). *Accord Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Duckworth v. Serrano*, 454 U.S. 1 (1981) (per curiam). In addition, strict compliance with the exhaustion requirement properly acknowledges that state courts, no less than federal courts, are bound to safeguard the constitutional rights of state criminal defendants, *Irvin v. Dowd*, 359 U.S. 394, 404-05 (1959); *Ex parte Royall*, 117 U.S. 241, 251 (1886), as well as increasing the likelihood that the factual allegations necessary for a resolution of the petitioner's constitutional claim will have been fully developed in state court, making federal habeas review more expeditious. *Rose*, 455 U.S. at 519.

This Court has also noted that the habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983); *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982) (per curiam). To demonstrate compliance, the petitioner must show that the claim he asserts in federal court has been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989). To be "fairly presented," the federal claim must be the substantial equivalent of that presented to the state courts. *Picard*, 404 U.S. at 278; *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986).

This Court has interpreted substantial equivalence to mean that *both* the legal theory and the facts on which a federal claim rests must have been presented to the state

courts. *Ross*, 868 F.2d at 641; *Bond*, 864 F.2d at 309; *O'Halloran v. Ryan*, 835 F.2d 506, 508 (3d Cir. 1987); *Gibson*, 805 F.2d at 138. *Accord Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989); *Dispensa v. Lynaugh*, 847 F.2d 211, 217 (5th Cir. 1988); *Wise v. Warden, Maryland Penitentiary*, 839 F.2d 1030, 1033 (4th Cir. 1988); *Daye v. Attorney General of New York*, 686 F.2d 186, 191 (2d Cir. 1982), *cert. denied*, 464 U.S. 1048 (1984) (en banc) ("In order to have fairly presented his federal claim to the state courts the petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court."). By requiring that the habeas petitioner provide the state courts with both the same legal theory and the same factual predicate underlying the constitutional argument, the federal court ensures that the same method of legal analysis that is used by the federal court in resolving the petitioner's claim was also readily available to the state court when it adjudicated the claim. *Santana*, 685 F.2d at 74; *Zicarelli v. Gray*, 543 F.2d 466, 472 (3d Cir. 1976) (in banc) (citing *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972) (dictum)). *Cf. Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) ("28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim") (quoting *Picard*, 404 U.S. at 276-77). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims the petition must be dismissed. *Rose*, 455 U.S. at 510; *Santana*, 685 F.2d at 73.

After a complete review of the record before us, *cf. Ross*, 868 F.2d at 640, we find that Landano has not

exhausted his state remedies as to the additional *Brady* claims he now has asserted in connection with his Rule 60(b) motion. Landano concedes that none of the suppression claims he previously raised in his initial habeas petition specifically included the information he now claims was suppressed, i.e., the information contained in the handwritten "ID on Landano" document and the Kearney Police Continuation Report.[11] Landano's previous *Brady* claims were based on impeachment evidence that Roth was being investigated for "underworld" connections, impeachment evidence that Roller was involved in previous robberies with Forni, evidence that Portas selected a photograph of Forni when asked to identify the driver of the green Chevrolet, and evidence relating to the involvement of Officer Snow's son in The Breed motorcycle gang.

However, Landano argues, and the district court found, that he has exhausted his present *Brady* claims in two ways: (1) by generally alleging throughout his state court proceedings that the State of New Jersey joined with the true perpetrators of the crime in suppressing inculpatory evidence of Forni and exculpatory evidence of Landano, and (2) by specifically alleging in his post-conviction brief that the State of New Jersey made no eyewitness record of identifications of Forni.

However, these arguments misconstrue the controlling principles developed by both the Supreme Court and this Court on the issue of exhaustion. With regard to

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[11] To avoid confusion, we will refer to these claims as Landano's "present *Brady* claims," and the claims described in the succeeding sentence as his "previous *Brady* claims."

Landano's first argument, we believe that a general claim that the prosecutor has suppressed exculpatory information cannot satisfy the exhaustion requirement as to all subsequent *Brady* claims that a habeas petitioner may bring. As noted above, this Court has consistently held that in complying with the exhaustion requirement a habeas petitioner must not only provide the state courts with his legal theory as to why his constitutional rights have been violated, but also the factual predicate on which that legal theory rests. This requirement is especially appropriate in the context of an alleged *Brady* violation since the materiality of the suppressed information is determined by considering the strength of the state's case as a whole. *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). As is plainly evident from the district court's own opinion in the instant case, in making such a determination the court must conduct a fact-sensitive examination of the precise nature of the suppressed information, along with a delicate judgment as to whether there is a reasonable probability that had the suppressed evidence been disclosed, the outcome of the trial would have been different. *Carter v. Rafferty*, 826 F.2d 1299, 1306 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (citing *United States v. Bagley*, 473 U.S. 667, 652 (1985)). If the specific nature of the *Brady* material underlying the petitioner's claim is not revealed to the state court, as in the instant case, the state court is effectively foreclosed from fully engaging in this type of an analysis. Under such circumstances, the state court has clearly not had "a 'fair opportunity' to apply the controlling legal principles to *the facts bearing upon [the petitioner's] constitutional claim.*" *Anderson*, 459 U.S. at 6 (emphasis added). *See also Daye*, 696 F.2d at 191 (a

habeas petitioner "must have set forth in state court all of the essential factual allegations asserted in his federal petition; if material factual allegations were omitted, the state court has not had a fair opportunity to rule on the claim").

Landano's second argument is that his present *Brady* claims were exhausted when he alleged in his post-conviction brief, with appropriate citations to *Brady v. Maryland*, 372 U.S. 83 (1963) and its progeny, that:

> – Eyewitnesses were pressured, cajoled, or led into identification of Mr. Landano. In some cases no record was made of eyewitness identification of Forni.

App. at 399. We believe, however, that this portion of Landano's post-conviction brief can not suffice to exhaust his state remedies as to his present *Brady* claims for two compelling reasons. First, we re-emphasize that for the exhaustion requirement to be satisfied the claim that is presented to the federal courts must have been fairly presented to the state courts. For purposes of the exhaustion requirement, a "claim is composed of fact and law, and both must be presented to the state court before a reasoned decision can be made." *O'Halloran*, 835 F.2d at 510. The above-quoted portion of Landano's trial court brief appeared in the "Preliminary Statement" of his post-conviction brief.[12] The factual predicates for these allegations correspond to legal issues raised later in the brief:

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[12] The clause introducing the section clearly indicates that the allegations Landano is making in the preliminary statement will be factually supported in the argument section to follow.

eyewitness Roth was pressured by the State into identifying Landano by means of a state investigation into his "underworld" connections; eyewitness Portas was led and cajoled by the State into identifying Landano by the improper removal of photographs from the array he examined and by the parading of Landano in front of Portas prior to his in-court identification; and the State made no record of eyewitness Portas' identification of Forni as the driver of the getaway car at his initial pre-trial identification session. These are clearly different factual predicates than the ones which comprise his present claims: a witness named "Joseph Pasapas" identified Forni as being the driver of the Kearney getaway car, and Pascuiti, as well as several other witnesses, were improperly shown a single photograph of Landano and rejected it. Since the factual predicates of Landano's various suppression allegations are substantially different, it is wrong to rigidly label them all as the *same* claim in order to satisfy the exhaustion requirement. *See Humphrey v. Cady*, 405 U.S. 504, 516 n.18 (1972) ("The question . . . is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim"). *Cf. Gibson*, 805 F.2d at 135 (no exhaustion when the state ineffectiveness of counsel claim was based on counsel instructing the petitioner to plead guilty to offenses which he claimed not to have committed, the petitioner not receiving the sentence which his counsel led him to believe he would receive if he pled guilty and the counsel's inadequate explanation of the plea bargain, while the federal ineffectiveness of counsel claim was based on counsel's failure to protect

the petitioner's juvenile status); *Zicarelli*, 543 F.2d at 472-73 (no exhaustion when the state court sixth amendment claim was based on the failure of the petitioner's jury to be drawn from the county where the crime had been committed, while the federal court sixth amendment claim included allegations that the procedures employed by the state in assembling the jury violated the cross-section concept of the sixth amendment); *Keller v. Petsock*, 853 F.2d 1122, 1126-27 (3d Cir. 1988) (the exhaustion requirement is not satisfied when petitioner's claim in federal court asserted that the trial court actually told the jury it would not entertain questions during their deliberations, while the state court claim simply asserted that at no time was the jury informed that they could direct questions to the court).[13] *But cf. United States ex rel.*

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[13] The Court of Appeals for the First Circuit has summarized what appears to be the prevailing view in the circuits:

> Some claims of constitutional violations – such as ineffective assistance of counsel or unfair trial – encompass an almost limitless range of possible errors. A defendant raising a Sixth Amendment violation who complained in state court about counsel's failure to object to certain testimony should not be deemed to have exhausted his or her remedies if the federal court claim asserts ineffective assistance of counsel based on a conflict of interest. In such a case, the state court's analysis of the alleged constitutional error necessarily would differ substantially from the federal court's consideration of the Sixth Amendment claim. And the defendant's argument would not have alerted the state court to the claim that formed the basis of the habeas corpus petition.

Lanigan v. Maloney, 853 F.2d 40, 45 (1st Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 788 (1989) (dicta) (cases cited therein).

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Johnson v. Johnson, 531 F.2d 169, 172 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976) (federal court ineffectiveness of counsel claim based on counsel's advice to petitioner not to testify and variance between opening remarks and trial strategy was exhausted even though state claim was primarily based on counsel's failure to adequately investigate alibi witness).[14] Any other result would deprive the New Jersey courts of the initial opportunity to pass upon and correct, if necessary, the alleged violations of Landano's constitutional rights occurring in their system.[15] *Cf.*

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Accord Burns v. Estelle, 695 F.2d 847, 849-50 (5th Cir. 1983) (ineffective assistance of counsel claims); *Towndrow v. Henderson*, 692 F.2d 262, 265 (2d Cir. 1982) (ineffective assistance of counsel claims); *Winfrey v. Maggio*, 664 F.2d 550, 553 (5th Cir. 1981) (ineffective assistance of counsel claims); *Turner v. Fair*, 617 F.2d 7, 10-12 (1st Cir. 1980) (sixth amendment confrontation clause claims); *Mayer v. Moeykens*, 494 F.2d 855, 858-59 (2d Cir.), *cert. denied*, 417 U.S. 926 (1974) (fourth amendment claims). We conclude that this description is equally applicable to *Brady* claims.

[14] Although *Johnson* appears to be inconsistent with *Gibson*, the *Johnson* court did stress that at the state court hearing on the petitioner's post-conviction claims, the petitioner gave the court notice that his ineffectiveness claim was not based solely on the inadequate investigative aspects of his counsel's work. *Johnson*,

[15] The analytical significance of Landano's new factual allegations cannot be gainsaid. The dissent overlooks the fact that based only on the factual allegations raised in the state courts, the district court *and* this Court agreed that Landano's previous *Brady* claims were based on information that was indeed suppressed, but not material. If it is true, as the dissent suggests, that the method of analysis used by the district court

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Wilwording v. Swenson, 404 U.S. 249, 250 (1971); *Darr v. Burford*, 339 U.S. 200, 204 (1950) (overruled in other respects by *Fay v. Noia*, 372 U.S. 391 (1963)).

There is an additional reason for rejecting Landano's second exhaustion argument. A careful reading of Landano's present *Brady* claims shows that neither involve the cajoling or pressuring of eyewitnesses by the State, nor do they involve the failure of the State of New Jersey to make a record of eyewitness identifications of Forni. Rather, the handwritten "ID on Landano" document contains alleged information that witnesses were shown a photograph of *Landano*, not Forni, and rejected it. Such misconduct by the police is certainly not alleged by Landano to have involved cajoling or pressure. On the other hand, the Kearney Police Continuation Report does contain an apparent identification of Forni by a witness, but importantly a record *was made* of this identification, i.e.,

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with respect to Landano's present *Brady* claims was readily available to the state courts previously, then it follows that not only did the state courts fail to properly employ this analysis, but so did the district court in initially rejecting Landano's habeas corpus petition and so did this Court in affirming the district court. We believe that this must be wrong because clearly it is the new factual allegations raised by Landano, not the recognition of a previous analytical mistake, that have now caused the district court to completely re-evaluate its previous analysis as to the materiality of the prior suppressed material and to incorporate this material into analysis of the materiality of the present *Brady* claims. *See* discussion *supra*. Obviously, this same analysis was not available to the state courts previously and thus Landano's present *Brady* claims cannot be held to have been exhausted under *Zicarelli*, 543 F.2d at 472.

this information is memorialized in the Continuation Report itself.[16] Therefore, the suppression theory embodied in the preliminary statement relied upon by Landano does not even cover the information that Landano now alleges was suppressed and thus the New Jersey courts could not have been expected, *sua sponte*, to have considered these claims. *Gibson*, 805 F.2d at 139.

The Supreme Court case on which Landano relies for his exhaustion argument. *Vasquez v. Hillery*, 474 U.S. 254 (1986), is inapposite. In *Vasquez*, the habeas petitioner presented, at every level in the state courts, an equal protection challenge to the discriminatory selection of his grand jury. *Id.* at 256. After the petition asserting the same equal protection claim had been filed in federal court, the district court requested, under 28 U.S.C. § 2254 Rule 7(b), that the petitioner submit three additional items of information: census data from the year 1900, three affidavits from black residents of the county indicating that they were available to serve, and a statistical analysis of the cumulative census data from 1900 to 1960.[17]

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[16] We also note that the State of New Jersey argues that this Continuation Report, along with numerous other Continuation Reports, was given to Landano's trial counsel. The State's argument on this issue, as well as on other issues relating to the merits of Landano's claims, is not insubstantial.

[17] Census figures for 1910 through 1960 had been considered in the state court. *Hillery v. Pulley*, 533 F.Supp. 1189, 1199 n.21 (E.D.Cal. 1972).

The State argued that this additional information rendered the equal protection claim non-exhausted. The Supreme Court disagreed, holding that the affidavits were not new evidence because the state courts had already found as a fact that no black had every served on the grand jury and that this finding was binding on the federal courts. As for the statistical analysis, the Court noted that this information "added nothing to the case that this Court has not considered intrinsic to the consideration of any grand jury discrimination claim." *Id.* at 259. The Court thus rejected the state's non-exhaustion argument since "the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts. . . ." *Id.* at 260.

Landano attempts to argue, analogously, that he presented his *Brady* argument to the state courts and now in his Rule 60(b) motion has simply provided additional evidence to the federal courts of the extent of the State's suppression of exculpatory evidence. Since the additional evidence does not fundamentally alter his state court claim – rather it supports his repeated contention that Forni was the one who committed the Kearney robbery and murder – Landano urges us to apply *Vasquez* to this case.

However, we believe that Landano's argument is flawed because he simply attempts to assume as a premise what is at issue in this appeal. In *Vasquez*, the petitioner's claim had already been clearly exhausted in state proceedings. After exhausting his remedies, the petitioner merely provided the federal court with additional evidence supporting his claim. The only question in *Vasquez* was whether the additional evidence fundamentally

altered the *exhausted* claim. The question that is central to our analysis, and which was never at issue in *Vasquez*, is quite different: whether the substance of the habeas petitioner's federal claim has been fairly presented to the state courts. When seen in this posture, *Vasquez* is not relevant to the instant case and does not dictate a different result. As we have established above, Landano has not carried his burden of showing that he has fairly presented the substance of his present *Brady* claims to the state courts, therefore, the principles involving what quantum of additional evidence can support an exhausted claim without running afoul of § 2254(b) are irrelevant to our analysis.[18]

Interestingly, both Landano and the district court seem to have anticipated the conclusion we have now reached and thus have provided, collectively, two alternative grounds for reaching the merits of Landano's claims. Both of these arguments are essentially to the effect that because of the particular circumstances of this case, the exhaustion requirement should be excused. We find neither argument compelling.

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[18] Likewise, *Patterson v. Cuyler*, 729 F.2d 925, 929 (3d Cir. 1984) and *Bright v. Williams*, 817 F.2d 1562, 1565 (11th Cir. 1987) do not support Landano's position. These cases stand for the proposition that when a petitioner raises the *same* constitutional question in both state and federal courts and the resolution of that question requires the courts to review the same factual record, the failure of the petitioner to highlight the same facts in state court as he does in federal court does not mean the federal claim is non-exhausted. *See also United States ex rel. Kemp v. Pate*, 359 F.2d 749, 751 (7th Cir. 1966); *United States ex rel. Hamilton v. Ellingsworth*, 692 F.Supp. 356, 368 (D. Del. 1988).

Landano first urges us to find that the State of New Jersey has constructively waived its non-exhaustion argument because of its systemic, bad faith suppression of exculpatory evidence. Unfortunately, he provides us with no Supreme Court, nor even any lower court, decision that has fashioned such an exception to the exhaustion requirement. We can find no hint to any Supreme Court opinion that such an exception would be recognized or countenanced. In fact, just the opposite has been implied in recent opinions. *See, e.g., Duckworth,* 454 U.S. at 3 ("An exception [to the exhaustion requirement] is made *only* if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief.") (emphasis added).

Furthermore, we believe that such an exception would be inconsistent with the important concern with comity that informs our view of the exhaustion rule. As this Court has noted:

> Exhaustion is a rule of comity. "Comity," in this context, is that measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of the various states. Exhaustion, then, serves an interest *not* of state prosecutors but of state courts.

Trantino, 563 F.2d at 96 (emphasis in the original). *Accord Rose,* 455 U.S. at 518 ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings"); *Naranjo v. Ricketts,* Nos. 82-1534/1546, slip op. (10th Cir. 1982). Therefore, an exception "punishing" the prosecutor for misconduct by withholding the exhaustion defense would clearly not

serve the interest of comity as we have viewed that concept in the habeas context.[19] Thus, we decline Landano's suggestion to carve out an exception to the exhaustion rule for some constitutional errors, i.e., *Brady* violations, but not others.[20]

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[19] The exception that Landano urges us to fashion would also frustrate one of the principal goals of the exhaustion requirement, i.e., increasing the likelihood that the factual allegations necessary to a resolution of the federal habeas claim will have been fully developed in state court and thus making federal review more expeditious. With Landano's suggested exception in place, federal courts would often be called upon to hold evidentiary hearings in order to develop the factual underpinnings for specific *Brady* claims not previously raised in the state courts. Moreover, this exception would force federal courts to adjudicate the merits of a habeas petitioner's *Brady* claims before deciding whether the petitioner has actually exhausted his state remedies. Both consequences militate against expeditious federal court review of habeas corpus claims.

[20] Landano implicitly invokes an additional argument for why our concern with comity would not be frustrated in this case by our adoption of his exception to the exhaustion requirement. He contends that the state courts have been responsible for his failure to uncover the specific *Brady* material that is the subject of his Rule 60(b) motion. Landano states that he "vainly sought expansive hearings and discovery that would have led to the discovery of the documentary evidence involved here." Brief for Appellee at 28-29. From the record before us, we believe that this suggestion is unfair to the New Jersey courts. The only requests by Landano we find in the record are for discovery on two specific and discrete issues: the identification of Portas and the coercion of Roth. Landano was provided with some discovery and a hearing in state court as to the former issue. And while the state court denied discovery

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Landano also argues that should we find that his *Brady* claims have not been exhausted, then we should accept the district court's alternative holding that the exhaustion requirement should be excused because of exceptional circumstances of peculiar urgency. *See Landano*, 126 F.R.D. at 644 n.6 (citing *Rose*, 455 U.S. at 515); Landano's Brief at 40 n.9. Landano argues, as did the district court, that the pattern of prosecutorial suppression of material, exculpatory evidence in this case amounted to exceptional circumstances. *Id.*

In *Rose*, the Supreme Court quoted a passage from an earlier Court decision, *Ex parte Hawk*, 321 U.S. 114 (1944), to the effect that: "it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.' " *Hawk*, 321 U.S. at 117 (quoting *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925)). As the Court in *Rose* noted immediately thereafter, the doctrine enunciated in *Ex parte Hawk* is now codified at 28 U.S.C. § 2254 (1982). This section reads in relevant part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the

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on the latter issue, even if we were to conclude that such a denial was inappropriate it would be extremely unlikely, or at best highly speculative, that such discovery would have led to the *Brady* material now at issue. But more importantly, Landano never provided to the state courts the additional information he has provided to the district court in his *ex parte* application seeking further discovery. We will not assume that the state courts, unlike the district court in this case, would not have granted Landano appropriate discovery had he done so.

> judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, *or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*

28 U.S.C. § 2254(b) (1982) (emphasis added).[21]

In the instant case, the State of New Jersey has advised us that Landano does have an available state remedy under N.J. Sup. Ct. R. 3:20-2. Although the burden rests with him, Landano has not disputed that Rule 3:20-2 provides him with an available remedy. The Rule states, in relevant part, that a "motion for a new trial based on the ground of newly discovered evidence may be made at

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[21] Section 2254(b) codifies both the exhaustion doctrine and the "special circumstances" exception to the doctrine:

> *Ex parte Hawk* prescribes only what should "ordinarily" be the proper procedure; all the cited cases from *Ex parte Royall* to *Hawk* recognize that much cannot be foreseen, and that "special circumstances" justify departure from rules designed to regulate the usual case. The exceptions are few but they do exist. Other situations may develop. Congress has not made statutory allowance for exceptions such as these, leaving federal courts free to grant habeas corpus when there exist "circumstances rendering such [state] process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254 . . . .

Darr v. Burford, 339 U.S. 200, 210 (1950) (footnote and citations omitted)(overruled in other respects by *Fay v. Noia*, 372 U.S. 391 (1963)). *See Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987); *Mayberry v. Petsock*, 821 F.2d 179, 183 (3d Cir.), *cert. denied*, 484 U.S. 946 (1987). *Accord Galtieri v. Wainwright*, 582 F.2d 348, 354 & nn.12, 13 (1978) (en banc).

any time . . . ." We have no choice but to conclude that there is not an "absence of available State corrective process" in this case. *Cf. Santana*, 685 F.2d at 75 ("At least where a fair reading of the state post-conviction relief statute indicates that a state court might well entertain constitutional claims not raised in prior proceedings, and in the absence of a state court decision clearly foreclosing such a result, we cannot conclude that petitioner has demonstrated compliance with the exhaustion requirement").

Moreover, neither the district court not Landano provides us with any "special circumstances" which would render this "process ineffective." Assuming, *arguendo*, that Landano's present claims have merit, even "clear violations" of constitutional rights do not provide the federal courts with an appropriate reason for excusing the exhaustion requirement. *See Duckworth*, 454 U.S. at 19. Even if we were to reach the merits and so conclude, a pattern of prosecutorial suppression of exculpatory evidence, without more, would not render the state court remedy available to Landano ineffective. We cannot assume that state courts will be any less protective of the constitutional rights of criminal defendants than federal courts.[22] *See, e.g., Darr*, 339 U.S. at 205 (quoting *Ex parte Royall*, 117 U.S. at 252). Nor should we assume that the state courts, after the dismissal of the petition herein, will

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[22] We cannot agree with the plain implication of the dissent that the federal judiciary has some greater insight into, or sensitivity to, the requirements of justice than that possessed by state courts.

be anything but expeditious in the consideration of Landano's claims.[23]

III.

For the foregoing reasons we believe that the district court erred in holding that Landano had exhausted his state remedies with respect to the new *Brady* claims he raises in his Rule 60(b) motion. Moreover, we do not find sufficient reason to excuse the exhaustion requirement in this case. Therefore, we will reverse the judgment of the district court and remand, directing the district court to vacate the order conditionally granting the writ of habeas corpus and dismiss Landano's petition. We also direct the district court to vacate all orders it issued in this matter subsequent to its initial order denying Landano's petition. Landano is free to exhaust his available state remedies with respect to his present *Brady* claims and thereafter petition the federal courts if necessary. Since the State's files will be returned, we will deny the State's petition for mandamus as moot. And because of our disposition of this case, the State's appeal of the district

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[23] Of course, if there is an inexcusable or inordinate delay by the state in processing his claims for relief, Landano may then seek appropriate relief in federal court. *See Burkett*, 826 F.2d at 1218. Although we join with the district court in finding Landano's new allegations deeply troubling, any delay that occurs in the consideration of these claims up until the point Landano files an appropriate motion in the state courts will not have been due to the neglect of the New Jersey courts, but rather the misjudgment of Landano's counsel as to the requirements of the exhaustion doctrine.

court's order on the work product and privilege issues is also moot.

ROSENN, *Circuit Judge*, dissenting.

I cannot agree with the majority's rigid application of the exhaustion doctrine as a ground for denying relief, in the face of the prior lengthy state court proceedings on substantially the same issue presented to the district court. Though the newly discovered evidence, which caused the district court to reverse its position and grant Landano's petition, may be a new development for the petitioner, it is not for the State. It had possession of the information during the entire habeas corpus proceedings in the state courts and during the initial hearing before the United States District Court and failed to fulfill its constitutional duty to divulge the evidence. Under such circumstances and because the purpose and spirit of the doctrine of exhaustion does not require that the issue in the federal court be framed precisely in the same terms as it was in similar proceedings in the state court. I respectfully dissent.

I.

The district court denied Landano's initial petition for habeas corpus, although deeply troubled by the record before it. Even then the record demonstrated the risks that an innocent person might have been convicted of a "despicable crime," but the court considered itself powerless to grant relief in light of prior precedent. *Landano v. Rafferty*, 670 F.Supp. 570, 580-84 (D.N.J. 1988), *aff'd*, 856 F.2d 569 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1127 (1989).

That precedent required it to accept as binding the credibility finding of the state court in its post-conviction proceedings concerning Porta's recantation. Furthermore, even though it initially found evidence that had been suppressed "relevant to the impeachment of Roller and Roth," it concluded that the suppressed evidence was not material in light of Pascuiti's trial testimony linking the killer to the driver of the getaway car and Portas's identification of Landano as that driver. *Id.* at 584-88.

The newly found evidence, however, cast a different light upon the district court's initial conclusion. Evaluating the new information presented, the same district court found that:

> [E]vidence which may have exculpated the petitioner and inculpated another had been systematically withheld from the petitioner and his counsel. That information coupled with the matters set forth in the court's previous opinion, affords to the court the opportunity to render the justice to the petitioner which was previously denied.

Landano v. Rafferty, 126 F.R.D. 627, 630 (D.N.J. 1989). Accordingly, the district court granted habeas corpus relief.

Throughout this litigation's lifetime, the petitioner had languished in prison for an excess of thirteen years. Only his passionate persistence in seeking to prove that he was framed, and not the cop killer a troubled jury found him to be after deliberating more than a day and a half and receiving an *Allen* charge, allowed him to uncover the new evidence. Although the majority, like the district court, finds "Landano's new allegations deeply troubling," it rejects the district court's decision to grant a

conditional writ of habeas corpus on the ground that Landano has not exhausted his state remedies as to the new evidence presented.

The majority appropriately recognizes, however, that the exhaustion doctrine is not a jurisdictional requirement but a juridical development to accommodate federalism and the sovereignty of the state. It seeks to promote comity and serves to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).

A.

The goal in applying the exhaustion doctrine, as developed by the judiciary, *see Ex parte Hawke*, 321 U.S. 114 (1944), and later codified, 28 U.S.C. § 2254, is to balance a civilized society's respect for personal liberty and justice against the principles of comity. The exhaustion doctrine, however, was never intended to be used "as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973).

A claim for habeas corpus relief once heard by a state court is considered exhausted unless it "is so clearly distinct from the claims [the petitioner] has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." *Humphrey v. Cady*, 405 U.S. 504, 517 n.18 (1972). This requires that the federal habeas corpus claim be the

substantial equivalent, not book and verse, of the earlier state court claim. *Picard v. Connor,* 404 U.S. 270, 278 (1971). This similarity should extend to both the facts and the legal theories which form the basis of the petition. *Gibson v. Scheidemantel,* 805 F.2d 135, 138 (3d Cir. 1986). Merely presenting additional evidence to the federal court does not make the claim unexhausted. The Supreme Court has unequivocally stated: "We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claims to the state courts." *Vasquez v. Hillery,* 474 U.S. 254, 257 (1986).

The exhaustion doctrine should not be applied rigidly in a vacuum; its application should reflect the factual complexities of each case, with emphasis on speed, judicial economy, and manifest justice. *See Hensley v. Municipal Court,* 411 U.S. 345, 350 (1973). As one commentator has written:

> To be effective, the exhaustion doctrine must be flexible. It must present the federal courts with general guidance, but permit them to appraise the circumstances in each case with sensitivity to competing interests. The doctrine is, or ought to be, a fact-oriented rule of prudence and discretion, applied on a case-by-case basis to orchestrate the exercise of federal jurisdiction in an effective manner without disrupting or displacing the work of the state court.

Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles,* 44 Ohio St. L.J. 393, 394 (1983).

In the interest of comity, a ritualistic formalism should not be exalted over a prudential application of substantial equivalence. After all, the doctrine is based on the interests of comity between sovereign powers, not the erection of a stone wall to bar justice in the face of substantial and good faith compliance. A petitioner should not be required, as the Court of Appeals for the First circuit has held, to adhere "inflexibly to the legal theories and factual allegations recited to the state court." *Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982).

It is also crucial to realize that exhaustion requires merely that the state courts be given a fair *opportunity* to address the federal claim. As this court has stated, the principle does not require that the state courts have considered the claim precisely as made in the federal habeas court. *Gonce v. Redman*, 780 F.2d 333, 336 (3d Cir. 1985). Nor does it require that the state be given more than one such opportunity. *Keller v. Pestock*, 853 F.2d 1122, 1130 (3d Cir. 1988).

In his motion to reopen the habeas corpus proceedings in the district court, Landano claimed that the state had violated his constitutional right to the disclosure of exculpatory evidence by failing to turn over certain material items to him that were in its possession and control which would have supported his claim that he had been misidentified. He therefore argued that his due process rights had been violated. In its prior opinion, the district court had concluded that a state agent involved in the prosecution of Landano had made an impermissibly suggestive statement to Portas prior to his courtroom testimony; that the prosecution had suppressed information about co-defendant roller's additional activities as well as

information concerning a police investigation of Roth's business dealings, 670 F. Supp. 577-588. In the words of the district court it had already determined that "the prosecution either committed affirmative acts of misconduct or breached its *Brady* obligation with respect to three of the State's four key witnesses against Landano." 126 F.R.D. at 646.

In petitioner's motion to reopen, the district court now found that the prosecution did not turn over an additional police report which could have further impeached Roth, or a Hudson County prosecutor envelope which memorializes an apparent eyewitness identification of Forni as the getaway driver. The court further found that the prosecution did not turn over the two pieces of evidence directly at issue here. The court stated:

> There is no question that the record in this matter exposes a pattern of failures by the prosecution in this case to live up to its good faith duty to turn over exculpatory information. This pattern supports the position asserted by Landano from the outset that the prosecution suppressed evidence exculpatory to him and inculpatory of Forni.

Id.

B.

The new evidence which Landano now presents is consistent with the evidence he presented in his post-conviction proceeding in the state courts. The new evidence implicates the verdict in the same way the evidence that had been presented to the state courts did, most significantly the evidence that Forni reputedly organized

armed robberies and committed similar crimes in the past with Roller, and that Portas originally had picked *someone other than Landano,* possibly Forni, out of the photographic array. It points to Forni, and not Landano, as Officer Snow's killer.

The evidence introduced in the state proceedings regarding Roller implicates Forni, by demonstrating a pattern of criminal activity involving Roller and Forni, a pattern into which the robbery leading to the shooting of Officer Snow fits very nicely. The evidence regarding Portas' identification proved that Landano did not shoot Officer Snow because he was not the driver of the getaway car (whose driver shot Snow), and possibly, if Forni's photo was identified, that Forni was the killer. It also seriously questions the reliability of the witness identifications of Landano. These are exactly the same implications which are drawn from the new evidence. To the extent that the State was able to review the evidence and reach a decision concerning this evidence, it should be found that this gave the State its requisite fair opportunity to assess Landano's *Brady* claim in its totality.

Additionally, Landano requested and was denied, at the state level, further and more complete discovery into withheld evidence, 126 F.R.D. at 641. If this discovery had been granted, the additional evidence in support of misidentification which Landano now presents quite likely would have been discovered, and thus would have been before the state court. This request, in combination with the other proven instances of withheld evidence, gave the State a fair opportunity to correct the constitutional wrong it had perpetrated against Landano.

Furthermore, Landano specifically argued, prior to discovering the evidence which forms the basis of his new application, that there was most likely more evidence, possibly relating to Pascuiti's identification, which had been withheld. Landano's counsel argued during the hearing on his original petition to the district court:

> Important not only for Portas' testimony, but again, the record shows that S-2 [a photographic display which contained pictures of Landano and Forni] was shown to Jacob Roth. The record is unclear, but I think there is an inference that S-2 was also shown to Jonathan Roth, your Honor, an interesting issue for me that is unresolved is what about Joseph Pascuiti. Joseph Pascuiti is the only witness who saw the killing. He saw a man with closely cropped curly hair, no mustache. That is a description that matches a little of Forni.

Counsel was able to make this argument without the benefit of the newly discovered evidence concerning Pascuiti and Basapas. Counsel's ability to make this argument, and I suppose, though it is not in the record, that a similar argument was made in the state court, demonstrates that the same "method of analysis" applied by the district court following the introduction of the new evidence was available to the state courts. This was true even without the direct evidence now presented, thus giving the state judicial system the fair opportunity required to constitute exhaustion of state remedies. *See Ross v. Pestock*, 868 F.2d 639, 641 (3d Cir. 1989).

Similarly, Landano's contentions in the state courts regarding the destruction and withholding of evidence relating to witness identifications of Forni, in combination with his denied requests for additional discovery,

allowed the state court a fair opportunity to examine Landano's claim as now presented. As the trial court appropriately noted in its opinion, "this is not a case in which the state court had no indication that the prosecutor had violated Landano's due process rights by suppressing exculpatory evidence." 126 F.R.D. at 643.

Thus, this is not a case "in which the prisoner has attempted to expedite federal review by deliberately withholding essential facts from the state courts." *Vasquez*, 474 U.S. at 260. On the contrary, whatever facts were withheld here were by the police and the prosecution. What the district court had before it on the motion to reopen was supplemental evidence, newly discovered in the possession or control of the prosecution, after an intense and desperate search by the prisoner. Thus, I would conclude that this supplemental evidence "did not fundamentally alter the legal claim already considered by the state courts and, therefore, did not require that [petitioner] be remitted to state court for consideration of that evidence." *Id.* at 260.

The crux of the majority's opinion is that the new evidence, the negative identification of Landano and the Basapas/Pasapas identification of Forni, made Landano's *Brady* claim, *see Brady v. Maryland*, 373 U.S. 83 (1963), substantially different from the claims he had made in the numerous state court proceedings. This analysis is based largely upon the majority's conclusion that Landano's claims, and *Brady* claims in general, are similar to other types of claims, generally ineffective assistance of counsel claims, in which a near identity of factual allegations is required for a claim to be considered exhausted. I do not

find the analysis adopted in those cases equally applicable to this or many other *Brady* type claims.

One key distinction between the ineffective assistance of counsel cases cited by the prosecution and *Brady* claims, in terms of exhaustion, is the burden placed upon the petitioner by requiring factual identity. In a typical ineffective assistance of counsel claim, the petitioner should know all of the facts which form the basis of his claim immediately following his trial. From the time he hires new counsel and relates the facts of his case to that counsel, he has the ability to bring a claim, presumable in state court, for relief based upon all of the alleged improprieties. Thus, the burden of presenting all of his claims initially and at one time is very low in ineffective assistance of counsel cases.

For a *Brady* claimant, however, the burden of presenting all of his claims once and forever is much higher. The petitioner in this type of case does not know he has a claim until he discovers the evidence which was withheld. This could come at any stage of the proceedings. Thus, there is a practical barrier to this type of claimant bringing all of his claims, based upon all of his factual allegations, at the same time. This barrier is made even higher if petitioner is forced to go through the entire state and federal court hierarchy each time he finds a new piece of evidence to support his contention.

It must also be remembered that at all times during this procedure, the petitioner has been in prison. Not only was his freedom restricted, but also his ability to pursue evidence of his innocence. It is a testament to Landano's claim of mistaken identity and innocence that

he was able to discover this crucial evidence so long after his trial.[1]

A second distinction between a *Brady* type claim and a claim for ineffective assistance of counsel is the complexity and range of possibilities the claims present. As the majority notes, there is almost a limitless number of possible errors involving ineffective assistance of counsel, e.g., conflict of interest, poor advice regarding a plea, poor advice regarding whether or not to testify, inadequate preparation time. All of these involve an extensive review of the facts associated with the alleged incident, and the effect this had upon the trial and subsequent guilty verdict. All concern different types of actions by counsel or the court. *See e.g., Domanique v. Butterworth,* 641 F.2d 8, 13 (1st Cir. 1981).

Brady claims, on the other hand, involve only one type of misconduct, a failure to deliver exculpatory evidence to the defendant. Once a state court determines that certain evidence has been withheld in violation of *Brady,* as the Superior Court of New Jersey did in its denial of Landano's 1978 motion for a new trial, it is a very small step to conclude, when presented with additional evidence, that other materials were also withheld. The state court has already made a determination that the

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[1] Landano has displayed remarkable steadfastness given the circumstances. Not only has he vigorously pursued vindication, but he has also made a positive contribution to the prison and society in general. During his years of incarceration in the Rahway State Penitentiary, he was the founder and president of "The Lifers," the group of prisoners sentenced to life imprisonment which ran the nationally recognized juvenile rehabilitation program. "Scared Straight."

prosecution violated defendant's right to have that evidence at trial. Thus, a standard of factual equivalence similar to the one used in sixth amendment exhaustion determinations is neither required nor necessary in a *Brady* exhaustion analysis such as involved in this case.

Likewise, the result of the violation is more easily assessed, and is more critical, in the *Brady* context, than in the ineffective assistance of counsel context. *Brady* claims, such as those made by Landano, undermine the jury's ultimate determination of guilt or innocence. The evidence of the negative identification of Landano by Pascuiti and the positive identification of Forni by the mysterious Mr. Basapas demonstrates that at least two witnesses thought, or possibly knew, that Landano did not fire the gun which murdered Officer Snow. To assess this implication takes little analysis or thought. Ineffective assistance of counsel claims involve many more assumptions and conjectures. Sixth amendment claims also do not necessarily undermine the reliability of a jury verdict, but more squarely implicate the process by which that verdict was reached. Thus, the right to effective assistance of counsel cases relied upon by the majority are inapposite to the *Brady* claims we now have before us.

Furthermore, violations which so greatly undermine the reliability of a verdict imposing a lifetime confinement deserve more careful and immediate attention than other types of violations. These cases are not only of great concern to the prisoner involved, but to the State and to prison officials and staff. A state's interests are best served by undoing a probable wrong in the quickest

possible manner.[2] Given the prudential policy of comity which underlines the exhaustion doctrine, such a high degree of factual identity between state and federal court claims should not be required in the most important cases. Here, and in cases like the instant case, the interests of justice provide a powerful incentive to weight the concerns of comity in favor of the prisoner's liberty interests. This is precisely what the district court did.

C.

Given the extraordinary facts in this *Brady* claim, the majority erects an unrealistic barrier which serves no

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[2] See Remington changes in the *Availability of Habeas Corpus:* Its Significance for State Prisoners and State Correctional Programs. 85 Mich L. Rev. 570, 580-90 (1986). Remington argues that:

> A post conviction process which is responsive to those who have an arguable claim of innocence (not guilty or at least not guilty of as serious an offense as that of which they were convicted) is desirable for several reasons: (1) imprisoning people who ought not be confined for so long is economically wasteful: (2) a correctional program is unfairly burdened if it is asked to treat constructively a person who has an arguable claim of innocence; and (3) a most basic right of an individual is not to be punished for a crime he or she did not commit. It would seem to follow from a state correctional program point of view the greatest opportunity for post conviction review, both state and federal, should be for those who can make an arguably valid showing that the guilt-finding process failed in their case.

Id. at 582-83.

useful purpose except to burn up valuable judicial time and expenses in both the state and federal judicial systems. Petitioner has made legitimate efforts to gain relief in the state forum. Professor Yackle's interpretation of the exhaustion principle is most appropriate in this context:

> If prisoners make some effort at exhaustion and present at least some arguable case for compliance, and if it appears that the state courts have concluded that no relief is warranted, then surely it is reasonable to consider the perceived merit of the claim before bucking the case back to the state forum in knee-jerk fashion. In cases in which the federal habeas corpus court anticipates that relief will be awarded when the merits are reached, it seems unduly harsh to condemn prisoners to further unconstitutional confinement if, and this is important, a legitimate argument can be made that the exhaustion doctrine has been satisfied.

Yackle. The *Exhaustion* Doctrine, *supra* at 421.

Forcing a *Brady* claimant back to state court each time he finds new evidence that the State has withheld is in effect like allowing the State to remove a man's eyeglasses and then penalizing him for his impaired vision. As the Court of Appeals for the Eighth Circuit held in a case most similar to Landano's, "A due respect for comity does not require that federal proceedings be halted each time the state produces additional evidence potentially favorable to the petitioner." *Austin v. Swenson*, 522 F.2d 168, 170 n.5 (8th Cir. 1975). *See also United States ex. rel. Merritt v. Hicks*, 492 F. Supp. 99 (D.N.J. 1980) (following *Austin v. Swenson*).

Sending Landano back to state court would not advance the twin goals of respect for state sovereignty and

educating state courts regarding federal constitutional rights. It will encourage state law enforcement officials to disregard the valuable rights protected by the *Brady* doctrine. It would remove from the State "any incentive to make timely disclosure of material, exculpatory evidence and trivializes the constitutional right recognized in *Brady* and its progeny." *Monroe v. Blackburn*, 476 U.S. 1145, 1150 (1986) (Marshall, J., dissenting from denial of certiorari).

It is not an undue burden to force a state prisoner to go to state court upon finding the first piece or set of withheld evidence. It is an unfair burden, though, to force that person back to state court, after he has already petitioned for federal habeas corpus, each and every time he finds *another* piece of evidence. This is particularly true, when his case has been through the state court system twice and he has been imprisoned for thirteen to fourteen years. Thus, I would join the Court of Appeals for the Eighth Circuit in formulating a rule, which would hold *Brandy* claims based upon new evidence exhausted as long as the petitioner had previously made a *Brady* claim in the state court based upon evidence of similar importance and effect.[3] As that court of appeals held,

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[3] The petitioner must have based his state court *Brady* claim upon more than mere allegations; he must have been able to substantiate it with some evidence. *See* Wisc v. Warden, 839 F.2d 1030 (4th Cir. 1988); Sampson v. Love, 782 F.2d 53 (6th Cir.), *cert. denied*, 479 U.S. 844 (1986); United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 94 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978).

The new evidence should have a similar impact upon the case. For instance it would not constitute exhaustion if petitioner

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"Absent a willful withholding of evidence by the defendant in the state proceeding, the requirement of exhaustion does not preclude the District Court from entertaining the issue previously raised in state court and deciding the habeas claim upon the basis of new evidence." *Austin v. Swenson*, 522 F.2d at 170.

Under this standard, the district court here properly entertained Landano's petition. Landano spent nearly eight years litigating his case in the New Jersey court system. All along he claimed he was framed, and that Forni was actually the killer. Each step of the way he uncovered more and more evidence which had been suppressed by the State, the prosecution, or the police. Each time he found new evidence, inculpating Forni and exculpating himself, he presented it to the state court. The state courts, though finding that evidence had been withheld, denied relief.

Finally, he petitioned the federal district court for relief. Forced by the weight of the state court's findings, that court initially denied him relief, despite its determination that the guilty verdict against Landano was not well grounded. 670 F. Supp. at 583-84. The court believed its result to be so harsh and unjust, yet required by its interpretation of the controlling law, that it virtually

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raised a *Brady* claim based upon the withholding of evidence relevant to the voluntariness of his confession, and later presented a claim based upon withheld evidence regarding identifications. Here, Landano's new evidence had two effects, undermining identifications of Landano and implicating Forni. The withheld evidence relating to Portas, Roller, and Roth, all of which was presented to state tribunals, had similar effects.

implored the appellate court to reverse. *Id.* at 572. After his original petition ran its course, Landano discovered new evidence, the Basapas identification. He petitioned the district court to reopen the case. Only after the district court granted him complete and open discovery did he uncover the negative identification of Landano. Upon this record and after all these years and expense, it would be harsh to require Landano to once more begin the expensive, lengthy, and weary course in the state judicial system to vindicate himself. His persistent efforts to clear himself have already encountered many high hurdles.

II.

Because I would hold that Landano had exhausted his state remedies as statutorily required, I must, of necessity, reach the other substantive issues raised by the State. I will briefly analyze each of the these issues below.

The next procedural issue which the State raises is that it was improper for the district court to reopen the case under Federal Rule of Civil Procedure 60(b). Rule 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made

> within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). The State claims that the district court should not have reopened its initial habeas corpus decision, because the new allegations, which are merely newly discovered evidence (60(b)(2)) and attorney misconduct (60(b)(3)), were not made within one year of the original judgment, as required by the rule. The district court recognized this problem, and granted Landano's motion to reopen upon the residuary clause. Fed. R. Civ. P. 60(b)(6), which is not subject to the one year limitation.

The Rule 60(b)(6) savings clause should be used only in extraordinary circumstances. *Moolenaar v. Gov't of the Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987). Generally, this requires that the petitioners make "a more compelling showing of inequity or hardship" than normally would be required to reopen a case under subsections (1) through (5). *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988); *see Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975). If such a hardship is ever present, it would seem that it is present in this case.

The allegations which Landano makes are not in the context of a civil case, as are most motions under Rule 60(b), but instead in a case where a man has been imprisoned for many years for a crime he might not have committed. The new evidence is not evidence which would merely change the district court's judgment, but evidence which goes to prove the innocence of a convicted man. The prosecutorial misconduct is not merely a

breach of discovery, but it is constitutional violation. To this extent I agree with the district court which held:

> The court cannot conceive of circumstances more "extraordinary" than those presented here, where a prisoner presents evidence that he was convicted without the benefit of exculpatory evidence and that such evidence was not available to him until the time of his motion for relief under Rule 60(b) because of the failure of the State to meet its obligation to turn over such evidence. Landano should not be deprived of the opportunity to present evidence of the suppression of exculpatory materials simply because the State successfully suppressed such evidence until after his habeas corpus application was heard and decided by this court.

126 F.R.D. at 638.

III.

Continuing on a procedural tack, the State contends that the district court committed reversible error by failing to hold an evidentiary hearing prior to making its determination. *See Townsend v. Sain*, 372 U.S. 293 (1963). The State asserts that because the facts relevant to the two newly discovered documents were in dispute, and no court had ever made a determination of the nature of the documents and whether they were actually suppressed, a hearing was not only legally but logically necessary. New Jersey would urge us, assuming that we reach this question, to remand to the district court for an evidentiary hearing.

Townsend holds that "[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding." *Id.* at 312. The right to a fair and full hearing of facts is a due process right of the habeas petitioner and not the state. Though the state certainly has an interest in protecting the judgments rendered by its criminal courts, this interest is not as high as a person's constitutional interest in liberty. If the state does not receive a hearing and loses, it merely must retry the case. This is a burden, but not nearly as compelling as the burden to an unsuccessful habeas petitioner, who is returned, virtually without recourse, to prison.

In cases where a due process right is not blatantly violated, *Townsend* leaves it to the discretion of the trial court to determine if an evidentiary hearing is necessary. *Id.* at 318-19. Also, there is no requirement of a hearing if such a hearing would be frivolous. *Id.* at 317. In this case, the district court implicitly ruled that an evidentiary hearing would be largely frivolous, because the State failed to make any documented allegations to contradict the claims made by Landano. This, to me, displayed a proper exercise of discretion. Furthermore, the State *never specifically requested* a hearing of the district court, *nor did it protest* to the court because of the failure to hold such hearing.

Landano presented certifications from himself and appellate counsel that the State had never disclosed the documents in question, Landano himself is the only person who has been continuously involved in the case from

beginning to end, and asserts that he is familiar with all the evidence in the case. Appellate counsel reports that he did an extensive search of his files, Landano's files, and trial counsel's files and did not find the documents. Landano's trial counsel died sometime after trial, and thus is unable to confirm or deny the allegations made by Landano and appellate counsel.

The State's response was minimal. No member of the original prosecutions team, nor the police, could recall the two documents and thus were unable to recall if the documents were ever forwarded to Landano. Given this general lack of memory on the part of the State's potential witnesses, and the large amount of time which has passed, in all likelihood an evidentiary hearing conducted by the district court, or by a state court would have been unproductive. I therefore would hold that the trial court did not abuse its discretion by failing to hold an evidentiary hearing.

IV.

The State also appeals on substantive grounds, arguing that Landano is not due relief under *Brady*. It asserts that the evidence was not suppressed, and that even assuming that it was, the evidence is not immaterial. With respect to the negative I.D. of Landano, the State contends that Pascuiti testified at trial that he thought the gunman had curly hair, and he even admitted on cross-examination that he picked Forni as resembling the gunman. It similarly argues that Basapas is really Pascuiti, and thus again, the jury was aware that Pascuiti had tentatively identified Forni as the gunman. These are

questions of fact, and we review them only to determine that they are not clearly erroneous.

A.

In *Brady*, the Supreme Court held that a defendant's due process right to a fair trial is violated when the prosecution, actually or constructively, withholds material exculpatory evidence. 373 U.S. at 83. The prosecution is responsible for knowing what evidence appears in its files, regardless of whether or not it has actual knowledge of the evidence. *United States v. Agurs*, 427 U.S. 97-110 (1976). It is irrebutably presumed that the prosecution's file is coextensive with the police files. *See Giglio v. United States*, 405 U.S. 150 (1972); *Smith v. State of Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969).

The two pieces of evidence in this case, the police report reference to Basapas, and the negative I.D. of Landano were part of the police department file and were exculpatory. Thus, the State had an obligation to disclose them to Landano. The district court ruled that they were suppressed, and this finding is not clearly erroneous.

Landano and appellate counsel certify that these two documents were not disclosed. The State is unable to rebut this persuasively. It fails to present any direct evidence substantiating its claim. Essentially, its only argument is that Landano's trial counsel must have had access to the evidence, because he questioned Pascuiti at trial concerning a photo identification of Forni.

This allegation is rebutted, though, by Landano's own description of trial counsel's strategy. Landano certified that "At trial, Mr. Flynn [trial counsel] decided, as he put it, to go on a 'fishing expedition' or to 'fish out' whether or not various witnesses ever identified Victor Forni. Mr. Flynn did this with Jonathan Roth, Ann Marie DeMichelli and Joseph Pascuiti to name some witnesses Mr. Flynn tried this approach on." Given this certification, and that Flynn has died and thus is unable to definitively answer the question, it cannot be said that it was clearly erroneous for the district court to rule that the evidence had been suppressed.

B.

It is not enough merely that exculpatory evidence be suppressed; it must also be material in order for the evidence to serve as grounds for upsetting the jury verdict. Materiality required that there be a reasonable probability that if the evidence had been disclosed the result of the proceedings would have been different. *See United States v. Bagley*, 473 U.S. 667, 682 (1985). In judging the materiality of evidence, the court must consider the totality of the evidence and determine the relative "strength or fragility of the state's case against [the defendant] as a whole." *Carter v. Rafferty*, 826 F.2d 1299, 1308 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988).

In this case, following the first habeas hearing, and even before that, the State's case against Landano was extremely thin. Initially, the jury that ultimately convicted Landano, was nearly hung, and was only able to reach a verdict after almost two days of deliberation and a

"forceful" though not unduly coercive. *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1986). 670 F. Supp. at 589-90. Before reaching this verdict, the jury also requested and had reread to it the testimony of Pascuiti. Thus, it is clear that the jury considered this testimony highly significant.

Second, the case was factually very weak, based almost exclusively upon equivocal eyewitness identifications. The only physical evidence implicating Landano, hair samples and a somewhat distinctive hat, is not persuasive unless tied to conclusive identifications. The only participant identification, Roller's, is suspect because he had in interest in protecting Forni and in aiding the police as a part of his plea agreement. *Id.* at 584-86. Pure witness identification cases are inherently weak. As one commentator explains. "Many judges have concluded that at best most eyewitnesses can retain the memory of the obvious two eyes, one nose and one mouth. There is always cause for concern when guilt or innocence turns solely on identification testimony and nothing else connects the defendant with the crime." N. Sobel, Eyewitness *Identification*, Legal and Practical Problems (172).

The case has been made weaker and weaker by the subsequent proceedings. Portas, the only witness to definitively identify Landano, has attempted to recant his trial testimony, and has reported that he initially identified someone other than Landano as the driver of the getaway car. *Landano v. Rafferty*, 670 F. Supp. at 576-78. Roth, the victim, who related a version of the incident which was completely different from any other version, identified Landano, but it was subsequently discovered

that he might have done so to prevent a police investigation of his own illegal operations. *Id.* at 586-88. The state court also heard testimony from two of Roller's prison cell mates, which it found not to be credible, which supports Landano's claim that Roller framed him. All of this evidence, though, was not enough because of the initial strength of Pascuiti's testimony combined with Portas.[4] The newly discovered evidence, however, demonstrates that the State's case, erected upon a house of cards, has little, if any, credible foundation to it.

The Basapas identification is significant regardless of who is or was Basapas. If Basapas was Pascuiti, a proposition which given the difference in spelling seems to stretch the bounds of logic somewhere past its breaking-point, it shows that Pascuiti identified Forni as the killer. Though Landano's trial counsel managed to elicit some admission of this from Pascuiti, it was effectively rebutted by the prosecution, which pointed out that Pascuiti had not been able to positively identify anyone. Had the new evidence been available to defense trial counsel, he could have made this point more forcefully and pressed Pascuiti on the identification of Forni. Given the care with

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[4] The state court found that Portas' recantation was not credible, and thus refused to discredit his trial testimony. On the other hand, the district court, in the original habeas proceedings, found Portas' recantation to be credible, but was compelled to abide by the state court findings, because it was unable to find that the state court's credibility determination, a question of fact, was clearly erroneous. Landano v. Rafferty, 670 F. Supp. at 580-83. It is undisputed, though, that Portas was unable to identify Roller as the passenger in the getaway car. Thus, his identification is weak, even giving no credit to his later recantation.

which the jury considered Pascuiti's testimony, its request that his testimony be read to them, and the trouble they had in reaching a verdict, a stronger statement by Pascuiti concerning his earlier identification of Forni would have had a reasonable probability of changing the outcome.

If Basapas is not Pascuiti, the jury would have been presented with a direct witness identification of Forni, and not Landano. This would have rebutted the Portas identification, particularly given that Portas was unable to identify Roller as the passenger of the getaway car. If this supplemental evidence had been introduced at trial, it is more than probable, and likely, that the jury would have returned a not guilty verdict.

The negative I.D. of Landano is also material because it proves that the only man who saw the actual murder, Pascuiti, did not think that Landano was the killer. This is a much stronger statement than Pascuiti's testimony that the gunman had curly hair, as opposed to Landano who has straight hair. Again, the care with which the jury considered Pascuiti's testimony, and the difficulty they had in reaching a verdict, indicates that the added degree of strength which a negative identification by Pascuiti would have added to Landano's case creates a reasonable probability that Landano would have been found not guilty.

Though both pieces of evidence, in combination with past determinations, would be independent grounds for granting the petition, they are even stronger when viewed together. The evidence disclosed up until this

time has been amazingly consistent in supporting Landano's claim that he was wrongly convicted. It tends to substantiate Landano's original claim that evidence of identifications which would have detracted from the State's case against Landano was destroyed or withheld. Also, it supports the argument that Forni, and not Landano, was the killer, Accordingly, I would affirm in all respects the district court's grant of the conditional writ of habeas corpus.

V.

The State has filed a petition for mandamus to compel the return of the files in which it claims a work product privilege. It also has a pending motion for the return of the files. The mandamus proceedings have been consolidated with the State's appeal from the district court's judgment in the habeas corpus petition and briefed and argued together. We now turn to the mandamus petition.

I, like the majority, would return all of the files at this time but for a different reason. I would hold that there is no longer an urgent need to protect the files and that the temporary restraining order should be dissolved. This would make the mandamus petition moot.

The continuation of a temporary restraining order beyond the period of statutory authorization is generally considered to be the equivalent of the issuance of a preliminary injunction. *Sampson v. Murray*, 415 U.S. 61, 86 (1974). To justify such extraordinary relief a party must show that (1) s/he will most likely prevail on the merits appeal, (2) s/he will suffer irreparable harm if the relief is

denied, (3) other parties will not be substantially harmed by the relief, and (4) the public interest will be served. *See In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3rd Cir. 1982). The point of reference for conducting this analysis is the period after the district court entered its order denying the release of the files, for it is here that the injunction was extended indefinitely until this court entered its judgment.

In this case, Landano has not demonstrated irreparable harm, and thus the restraining order should be dissolved. Landano has already had an opportunity to view all of the State's records, with the exception of those in which it claims and was granted a work product privilege. To this extent, he has been privy to all of the information in those files, and has had an opportunity to discover any additional exculpatory evidence. Though Landano claims that the files should be sequestered to prevent any further destruction, such destruction would not cause him any harm at a retrial. He has already seen all of the evidence and can make use of it. He will also be given full and adequate discovery pursuant to any retrial. If the State attempts to hide anything from him in this discovery, he will be on notice of any impropriety, and will be able to adequately protest his interest at that time. Thus, the return of the files will not cause Landano irreparable harm.

Additionally, the public interest, and the prosecution's interest will be adversely affected by the continuation of the sequestration of the files. The State would need the files to reevaluate its case and determine if Landano should be retried. The State's ability to retry Landano would be severely limited if its files were not

returned, particularly in light of the ninety day period in which the district court ordered it to commence any proceedings against Landano. Delaying the return of the files injures the public's interest in the efficient and accurate operation of the criminal justice system. The public's interest was protected by the initial entry of the restraining order, because this allowed Landano the opportunity to prove that his trial had been unfair, and had reached an incorrect result. Now, though, assuming the district court were affirmed, that interest shifts to locating and trying Officer Snow's murderer, whether it be Landano, Forni, or someone else. Returning the State's files will facilitate this process; continuing the restraining order will frustrate it.

VI.

In conclusion, under the facts established here there is a grave threat to the fundamental right to personal liberty of an innocent man unless the conditional grant of the writ of habeas corpus is allowed. Applying the strictures of the exhaustion requirement and requiring repetitive, costly and time-consuming procedures in the state judicial system on substantially the same issue heard by the district court does not serve the cause of comity. To adhere so strictly to a prudential consideration of comity in the face of such manifest injustice detracts from the judiciary's role as the guarantors of justice and the Great Writ's ability to stand as the bulwark of personal liberties. I cannot join in such a result.

The judgment of the district court in granting the conditional writ of habeas corpus should be affirmed. The

State's motion for the return of the files should be granted and the petition for writ of mandamus denied as moot.

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5504, 89-5625 & 89-5638

VINCENT JAMES LANDANO,
Respondent

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, (East Jersey State Prison), PETER PERRETTI, (Attorney General, State of New Jersey), LESLIE FAY SCHWARTZ, (Deputy Attorney General), THE OFFICE OF THE HUDSON COUNTY PROSECUTOR, KEARNEY POLICE DEPARTMENT, NEWARK POLICE DEPARTMENT, JERSEY CITY POLICE DEPARTMENT and PERTH AMBOY POLICE DEPARTMENT,
Petitioners No. 89-5504

HONORABLE H. LEE SAROKIN, U.S. DISTRICT COURT JUDGE,
Nominal Respondent

VINCENT JAMES LANDANO

vs.

JOHN J. RAFFERTY, Superintendent, Rahway State Prison,
and
IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey

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VINCENT JAMES LANDANO

vs.

JOHN J. RAFFERTY, SUPERINTENDENT (East Jersey State Prison), PETER

PERRETTI, (Attorney General, State of New Jersey), LESLIE FAY SCHWARTZ, (Deputy Attorney General), THE OFFICE OF THE HUDSON COUNTY PROSECUTOR, KEARNEY POLICE DEPARTMENT, NEWARK POLICE DEPARTMENT, JERSEY CITY POLICE DEPARTMENT and PERTH AMBOY POLICE DEPARTMENT

John J. Rafferty, Superintendent, East Jersey State Prison, and Peter N. Perretti, Jr., Attorney General of New Jersey,
Appellants No. 89-5625 & 89-5638

SUR PETITION FOR REHEARING

BEFORE: HIGGINBOTHAM, *Chief Judge*; SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ROSENN,[1] *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Higginbotham and Judge Stapleton dissent from the denial of in banc rehearing for the reasons

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[1] As to panel rehearing.

noted in Judge Rosenn's dissent to the panel opinion. Judge Becker would have granted rehearing in banc.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: April 3, 1990

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

SALLY MRVOS
CLERK

TELEPHONE
215-597-2995

April 16, 1990

(Neil Mullin, Esq.
(Nancy Erika Smith, Esq.
Smith, Mullin & Kiernan
100 Executive Drive, Suite 340
West Orange, NJ 07052

Re: Landano vs. Raferty, etc.
Nos. 89-5504, 89-5625 and 89-5638

Dear Counsel:

Enclosed herewith is a conformed copy of order filed today staying the issuance of the mandate to May 3, 1990, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

/s/ Sally Mrvos/ch
Clerk
Direct Dial – 597-3143

ch
enc.

cc: (Richard W. Berg, Esq.
(Carol M. Henderson, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5504, 89-5625 & 89-5638

Vincent James Landano

vs.

John J. Rafferty, etc., Appellants

BEFORE: HUTCHINSON, COWEN and ROSENN, *Circuit Judges*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 3, 1990.

/s/ Robert E. Cowen
Circuit Judge

Dated: APR 16 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Plaintiff-petitioner, v. JOHN J. RAFFERTY, (Superintendent, East Jersey State Prison), PETER N. PERRETTI, JR., (Attorney General, State of New Jersey), Defendants-respondents.	Civil Action Nos. 85-4777 89-2454 CONDITIONAL WRIT OF HABEAS CORPUS (Filed Jul 27, 1989)

This order to show cause why a Writ of Habeas Corpus should not issue having come before this court on behalf of petitioner Vincent James Landano; and the court having heard Neil Mullin, Esq., attorney for the petitioner in support of the petition, and Carol M. Henderson, Deputy Attorney General for the State of New Jersey in opposition; and the court having considered the briefs and exhibits submitted by the parties; and for the reasons set forth in the accompanying opinion, and for good cause shown,

IT IS this 27th day of July, 1989,

ORDERED that this matter is reopened pursuant to Fed. R. Civ. P. 60(b); and it is further

ORDERED that this court's order of September 29, 1987 denying habeas relief to petitioner is vacated; and it is further

ORDERED that John J. Rafferty, Superintendent of the East Jersey State Prison, or whosoever may have custody of the body of Vincent James Landano, shall discharge the petitioner, Vincent James Landano, from custody insofar as he is held in custody by nature of his conviction on May 17, 1977 in *State v. Landano* for felony murder, armed robbery, and other offenses, unless the State of New Jersey shall institute proceedings to retry petitioner within 90 days from the date this conditional writ is entered; and it is further

ORDERED that any application for release pending appeal or retrial should be made, in the first instance, to the state courts; if no action is taken by the state courts within 30 days of said application, this court will entertain petitioner's application for enlargement under Fed. R. App. P. 23.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

UNITED STATES DISTRICT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Plaintiff-petitioner, v. JOHN J. RAFFERTY, (Superintendent, East Jersey State Prison), PETER N. PERRETTI, JR. (Attorney General, State of New Jersey), Defendants-respondents.	Civil Action Nos. 85-4777 89-2454 OPINION (Filed Jul 27, 1989)

SAROKIN, District Judge.

INTRODUCTION

We live in a Nation in which liberty is cherished second only to life itself. Society commits no greater wrong than to convict and confine (or execute) one who may be innocent of the crimes with which he or she has been charged. No greater responsibility is reposed in the federal judiciary than the review of convictions based upon alleged constitutional violations.

The writ of habeas corpus has served for centuries as the emancipator of those who have been wrongly accused or unfairly prosecuted in violation of the Constitution.

In its earlier opinion in this matter, the court stated:

> The murder of a police officer is a tragic event not only for the loss sustained by the officer's family, but because it is the ultimate symbol of

> lawlessness. That tragedy is compounded however, if there is a risk that an innocent person has been convicted of such a despicable crime. The record in this case demonstrates that there is just such a risk, but because of binding precedent this court is powerless to grant the relief which petitioner seeks and to which this court believes he is entitled.

Landano v. Rafferty, 670 F. Supp. 570, 571-72 (D.N.J. 1987).

New information has been presented to the court which demonstrates that evidence which may have exculpated the petitioner and inculpated another had been systematically withheld from the petitioner and his counsel. That information, coupled with the matters set forth in the court's previous opinion, affords to the court the opportunity to render the justice to the petitioner which was previously denied.

Neither the death of a police officer nor the grief of his family is vindicated or ameliorated by the conviction of one who may be innocent. The scales of justice are rendered askew by the withholding of evidence which supports the innocence of the accused or the guilt of another. No one should be deprived of the precious gift of liberty under such circumstances.

This matter is before the court on petitioner's motion to reopen and vacate the court's prior denial of his petition for a writ of habeas corpus and petitioner's renewed request that the court issue a writ of habeas corpus.

As more fully set forth below, the court determines that this matter should be reopened pursuant to Fed. R. Civ. P. 60(b), that petitioner has satisfied the exhaustion requirement set forth in 28 U.S.C. 2254, and that the

prosecutor's failure to disclose *Brady* material violated petitioner's due process rights and deprived him of a fair trial. Accordingly, a conditional writ of habeas corpus shall issue.

BACKGROUND

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearny, New Jersey.[1] During the robbery, one of the gunmen shot and killed a Newark police officer. A Hudson County grand jury indicted Landano and three other men, Allen Roller, Victor Forni, and Bruce Reen, for felony murder and other crimes stemming from the robbery. The trial of Forni and Reen was severed. Roller agreed to testify against Landano pursuant to a plea agreement.

The evidence at trial showed the crime was the work of a motorcycle gang called "The Breed," which frequently planned and executed armed robberies in the Staten Island area. Testimony at trial revealed that in June 1976, Allen Roller, president of The Breed's Staten Island chapter, together with Victor Forni, not a "Breed" member, but reputedly responsible for organizing most Breed criminal endeavors, conceived a plan to rob the Hi-Way Check Cashing Service which was owned and operated by Jacob Roth.

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[1] This account of the underlying crime and the trial proceedings is summarized from prior opinions of this court and the Third Circuit Court of Appeals in this matter. *See Landano v. Rafferty*, 670 F. Supp. 570, 573-575 (D. N.J. 1987), *aff'd*, 856 F.2d 569, 570-71 (3d Cir. 1988).

Though it was undisputed at trial that Landano was neither a Breed member nor a Breed affiliate, co-defendant Roller testified that Landano had been specifically recruited for this job. Roller admitted that Forni and not Landano was responsible for orchestrating the Kearny robbery, but Roller vigorously denied Forni's participation in the crime's execution. Roller testified that Landano was a longstanding friend of Forni's and that Forni had suggested recruiting Landano for this job.

In the early morning hours of August 13, 1976, Allen Roller together with a "dark-haired" accomplice, who Roller identified as Landano, arrived at Roth's check cashing service. Roller testified that he entered the trailer that housed the service and proceeded to steal the available cash while his partner remained outside.

During this time, a Newark patrol car driven by Patrolman John Snow arrived in the Hi-Way Check Cashing Service parking lot. Officer Snow had in his possession an attache case containing $46,000 in cash intended for delivery to Hi-Way Checking. Joseph Pascuiti, an employee of a nearby warehouse, testified that he saw a dark-haired man approach the police car and raise a gun toward the officer inside. When Pascuiti turned away to call for help, he heard several gunshots. Turning back to the parking lot, he saw a green Chevrolet, driven by the dark-haired perpetrator, pulling away. At trial, Pascuiti was not able to identify Landano as the dark-haired triggerman.

Roller testified that he and Landano sped away from the crime scene, with Landano driving and Roller in the back seat. According to Roller, Landano confessed upon

return to the car that he had had to "ice [or waste] the cop". Having escaped the crime scene, the getaway car soon came upon a traffic jam. The driver's frantic attempts to maneuver around a blocked intersection drew the attention of Raymond Portas' a truck driver whose truck was stopped at the intersection. Though Portas was unable to identify Roller as the vehicle's passenger, his description of the license number of the vehicle matched the number given by Roth, and he testified at trial that Landano was the driver of the car.

The evidence presented at trial included Roller's testimony naming Landano as his partner in crime, Pascuiti's testimony that the dark-haired man who shot Officer Snow was also the driver of the getaway car, and Portas' identification of Landano as the driver of the vehicle identified as the getaway car.

After the jury returned a verdict finding Landano guilty on all counts, he was sentenced to life imprisonment on the felony murder count and a consecutive term of seven to fifteen years on the remaining counts. Landano sought reversal of his conviction in state appellate and post-conviction proceedings, to no avail. Landano thereafter filed a petition for a writ of habeas corpus in this court pursuant to 28 U.S.C. Section 2254.

On September 29, 1987, this court issued an opinion and order, denying Landano's petition for habeas corpus relief. *Landano v. Rafferty*, 670 F. Supp. 570 (D.N.J. 1987). In that action, Landano contended that he was entitled to habeas corpus relief because (1) his due process rights to a fair trial were infringed by the admission of Raymond Portas' identification testimony; (2) the state unlawfully

suppressed exculpatory and material evidence that would have impeached the testimony of two trial witnesses, Allen Roller and Jacob Roth; and (3) the state court's coercive charge to the jury violated his Sixth Amendment right to an impartial jury. *Id.* at 573.

The court held that, although it found that Raymond Portas' recantation was credible, it was bound by the state court's factual determinations regarding the lack of credibility of Portas' recantation of his trial testimony and that, on the basis of the state court's factual findings, the court could not conclude that the admission of Portas' identification testimony violated Landano's due process rights. *Id.* at 583. In addition, the court held that although exculpatory evidence relevant to the impeachment of Roller and Roth was wrongfully suppressed by the state, the evidence suppressed was not "material" to the outcome of the trial in light of the other evidence against Landano. *Id.* at 586, 588. The "other" evidence consisted of Pascuiti's testimony that the dark-haired man who shot Officer Snow was also the driver of the getaway car and Portas' identification of Landano as the driver of the getaway car. In other words, the testimony of Pascuiti and Portas' taken together, compelled this court to conclude that there was no reasonable probability that an acquittal would have resulted had the prosecutor not suppressed evidence with respect to the impeachment of Roller and Roth. Finally, the court held that the *Allen* charge given by the trial court was not so coercive as to have deprived petitioner of a fair trial and the right to a unanimous jury. *Id.* at 590.

In December of 1987, the court denied petitioner's motion for reconsideration of its September 29, 1987 order, *Landano v. Rafferty*, 675 F. Supp. 204 (D.N.J. 1987), and the Third Circuit affirmed the court's denial of Landano's habeas corpus petition. *Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988). The Supreme Court of the United States denied *certiorari*. *Landano v. Rafferty*, 109 S.Ct. 1127 (1989).

On June 8, 1989, after considering Landano's *ex parte* application, this court entered a temporary restraining order directing the United States Marshal to seize and bring to this court files relating to the prosecution of Landano, Forni, Roller, or Reen maintained by the New Jersey Attorney General, the Hudson County Prosecutor, and several police departments. The government's claim of work product privilege with respect to certain materials was rejected by the court on June 15, 1989. After the government filed a notice of appeal from both orders, the Third Circuit Court of Appeals (per Greenberg, J.) granted a stay pending appeal with respect to this court's order of June 15, 1989.

Landano thereafter filed an Order to Show Cause why a writ of habeas corpus should not issue. Landano also moved to enjoin the State from retrying Landano for any crimes associated with the robbery of Hi-Way Check Cashing and the murder of John Snow on August 13, 1976. After receiving submissions from each side, the court heard oral argument on July 10, 1989.

DISCUSSION

I. Rule 60(b) Relief

Landano first argues that the order of this court of September 29, 1987, denying his application for habeas

corpus relief, should be reopened and vacated pursuant to Fed. R. Civ. P. 60(b), which provides for relief from a final judgment. Because the prior judgment of the court has since been affirmed by the Third Circuit, the court must first address its authority to consider plaintiff's application.

In *Standard Oil Co. of California v. United States*, 429 U.S. 17, 18-19 (1976), the grant of an injunction had been summarily affirmed by the Supreme Court. The movant sought to have the judgment set aside on the basis of misconduct by counsel for the government and by a material witness. Before filing a Rule 60(b) motion, the movant sought leave from the Court to proceed in the district court. The Supreme Court held that the district court could entertain the Rule 60(b) motion without leave of the Court, stating:

> In our view, the arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion. . . . The appellate-leave requirement adds to the delay and expense of litigation and also burdens the increasingly scarce time of the federal appellate courts. We see no reason to continue the existence of this "unnecessary and undesirable clog on the proceedings."

Id. at 18-19, quoting *S.C. Johnson & Son, Inc. v. Johnson*, 175 F.2d 176, 184 (2d Cir. 1949) (Clark, J., dissenting), *cert. denied*, 388 U.S. 860 (1949).

Since the *Standard Oil* decision, the Third Circuit has only refused to permit the reopening of a previously-affirmed judgment where the same facts or arguments in support of reopening the judgment were previously before the court of appeals or where newly asserted facts or arguments would not have affected the court's affirmance even had they been asserted earlier. Thus, in *Kock v. Government of the Virgin Islands*, 811 F.2d 240, 245-246 (3d Cir. 1987), the court held that the district court could not reopen the prior judgment pursuant to Rule 60(b)(6), because the new fact alleged did not go to the rationale upon which the court's affirmance had been based. In other words, the new fact could not be a "reason justifying relief" under the terms of Rule 60(b)(6), since it was not relevant to the court's reasons for affirming the first decision. *See also Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (where matter had been included or includable in prior appeal, it could not be the basis for Rule 60(b) relief).

However, in *Sellers v. General Motors Corp.*, 735 F.2d 68, 69 (3d Cir. 1984), the court reaffirmed the ability of the district court to consider Rule 60(b) relief even where a prior ruling had been affirmed by the Court of Appeals. In *Sellers*, the court affirmed a judgment of the district court and denied a request for a remand to consider new evidence which had been fraudulently concealed by the defendants. When the plaintiff later moved for Rule 60(b) relief, the district court denied the motion on the grounds that the Third Circuit's denial of the request for remand was the "law of the case" and precluded consideration of the new evidence. The Third Circuit reversed, holding that the denial of the remand request

> established no more than that we would decide the pending appeal on the record made in the district court prior to the filing of the notice of appeal. Our affirmance on that record did not limit the power of the district court to consider Rule 60(b) relief.

Id. at 69. *See also Schiavone v. Fortune*, 750 F.2d 15, 19 (3d Cir. 1984).

In the present case, the contentions made by Landano in support of his request for Rule 60(b) relief rely upon matters which were not and could not have been a part of the record before the Court of Appeals, and thus it is appropriate for the court to consider plaintiff's motion. This court initially denied habeas relief even though it found suppression of evidence relevant to the impeachment of Roller and Roth because it concluded that the suppressed evidence was not material in light of the other facts adduced at trial. Had the court known of other incidences of suppression which would cast doubt on the remaining facts supporting Landano's conviction, its assessment of the materiality of the suppressed evidence, and thus its conclusion that no constitutional violation occurred, may have differed. The Third Circuit's affirmance of this court's denial of habeas corpus relief to Landano also relied on the existence of sufficient evidence, even without the testimony of Roller and Roth, to support Landano's conviction. *Landano*, 856 F.2d at 573-574. Both this court's and the Third Circuit's decisions were based in part on the assumption that other evidence introduced during the trial was a sufficient basis for the jury to have convicted Landano, and the evidence presented by Landano in support of his Rule 60(b) motion now calls that assumption into question. Although the

issue of the suppression of exculpatory evidence was before the Third Circuit on appeal, the facts essential to a materiality determination which are presented here were *not* before the Third Circuit at that time. Thus, it is appropriate for this court to reopen the matter to consider its prior ruling in light of the newly asserted facts without petitioner having first obtained leave of the Third Circuit.

The court must next address the appropriateness of the application of Rule 60(b) in habeas corpus proceedings. Rule 11 of the Rules Governing Section 2254 Cases ("Habeas Corpus Rules") states:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

The court concludes that, at least in the context of the present case, the application of Rule 60(b) would not be inconsistent with the Habeas Corpus Rules.

In *Pitchess v. Davis*, 421 U.S. 482, 489 (1975) (per curiam), the Supreme Court held that Rule 60(b) may not be applied in habeas corpus proceedings where its application would serve to interfere with the exhaustion requirements of 28 U.S.C. Sec. 2254. However, the Court's opinion does imply that, where the exhaustion requirment [sic] has been met, Rule 60(b) may be applied in the context of a habeas corpus action.[2]

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[2] Since the court concludes *infra* at 41 that the exhaustion requirement has been met, *Pitchess* does not preclude the court from considering Landano's Rule 60(b) application.

Although the Third Circuit has not ruled on the question, Chief Judge Gibbons has stated that Rule 60 applies to habeas corpus proceedings. *Kravitz v. Commonwealth of Pennsylvania*, 546 F.2d 1100, 1104 (3d Cir. 1977) (Gibbons, J., dissenting). In *Kravitz*, the majority held that the court had no jurisdiction over a second habeas corpus action because the petitioner was no longer in custody. Judge Gibbons dissented, stating that since Rule 60(b) relief was available with respect to the first habeas proceeding, dismissing the second habeas action on jurisdictional grounds was not necessary. In fact, two months after the Third Circuit's decision in *Kravitz*, the petitioner moved for Rule 60(b)(6) relief with respect to the denial of her first habeas petition, and the district court ultimately granted her motion to reopen the prior habeas. *In re Kravitz*, 471 F. Supp. 665 (M.D. Pa. 1979). *See also Ziegler v. Wainwright*, 805 F.2d 1422 (11th Cir. 1986).

Habeas Corpus Rule 9(b) permits successive petitions for habeas corpus relief unless the court concludes that the ends of justice would not be served by consideration of the petition. *Cf. Sanders v. United States*, 373 U.S. 1, 15 (1963) ("[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged," id. at 8). The Third Circuit has stated that, in the context of a habeas corpus proceeding, a bar to Rule 60(b) relief would "serve only delay, not finality." *Burkett v. Cunningham*, 826 F.2d 1208, 1217 n. 26 (3d Cir. 1987). Thus, entertaining a Rule 60(b) motion after entry of an order dismissing plaintiff's first habeas petition would not necessarily be inconsistent with the Habeas Corpus Rules and would prevent the delay inherently involved in the

filing of a second petition. *See, e.g., Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987). *Cf. Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("[t]he scope and flexibility of the [habeas corpus] writ . . . its ability to cut through barriers of form and procedural mazes have always been emphasized and jealously guarded by courts and lawmakers").

Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceedings . . . or to set aside a judgment for fraud upon the court. . . .

Although Landano's motion is based upon Rule 60(b) in general terms rather than upon any specific subsection of the rule, he primarily argues that the court's judgment should be set aside as a result of the State's alleged fraud upon the court in the prior habeas proceedings.

Landano correctly asserts that the court is empowered to vacate a judgment if it was obtained through

a fraud upon the court. *See, e.g., Universal Oil Products Cf. v. Roof Refining Co.*, 328 U.S. 575, 580 (1946); *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 250-51 (1944); *Virgin Islands Housing Authority v. David*, 823 F.2d 764, 766 (3d Cir. 1987). A fraud on the court may be found to have been committed when an officer of the court misleads the court either intentionally or with callous disregard for the truth, where such misrepresentation disrupts the court's ability to fairly render a decision. *See Virgin Islands Housing Authority*, 823 F.2d at 767, citing *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976).

Despite Landano's allegations of a commission of a fraud on the court by the Deputy Attorney General, the court is convinced that any misstatements by D.A.G. Schwartz were not made for the purpose of deceiving either plaintiff or this court. She was given the specific task of locating any photographs or other documents indicating that Portas identified Forni, and her certification that no such photographs or documents were in the prosecutor's file was accurate. Given the nature of plaintiff's claims in the prior habeas proceedings, D.A.G. Schwartz perhaps ought to have disclosed the items in the files which are now at issue, but the court's order did not clearly obligate her to do so. In addition, the State asserts that it had no reason to believe that the Hudson County Prosecutor had not turned over any and all exculpatory materials in the files prior to the original trial. (*See* Brief on Behalf of Defendants in Opposition to Order to Show Cause [hereinafter "Government Brief"] at 12).

In order for the court to conclude that a fraud on the court was committed, it would have to find some element

of fraudulent intent on the part of the Attorney General's Office in failing to reveal the items in the file at issue and in D.A.G. Schwartz' representations to the court. These are serious allegations and the court necessarily would require a strong showing by the plaintiff that such intent existed before finding that a fraud on the court has been committed. On the record before it, the court cannot conclude that the Attorney General's office or D.A.G. Schwartz acted in bad faith or with any fraudulent intent.

Thus, the court concludes that Landano has failed to demonstrate an independent basis for reopening his prior habeas proceeding based upon his allegations that a fraud was committed upon this court. However, the court must next evaluate the appropriateness of reopening the judgment pursuant to the specific subsections of Rule 60(b), as opposed to the "savings clause" of that rule which permits reopening of judgments based upon independent claims of fraud on the court.

Motions under Rule 60(b) are addressed to the sound discretion of the court. *Ross v. Meagen*, 638 F.2d 646, 648-9 (3d Cir. 1981). Relief under subsections (1), (2), and (3) is not available to plaintiff, because motions under those subsections must be brought within one year of the entry of the order or judgment from which relief is sought. Fed. R. Civ. P. 60(b). However, the court concludes that the circumstances under which Landano now seeks relief are sufficiently extraordinary for relief to be granted under Rule 60(b)(6).

The Supreme Court has held that relief is available under Rule 60(b)(6) when "something more" than what is required under subsections (1) through (5) is shown.

Klapprott v. United States, 335 U.S. 601, 613 (1949). This extra element has been described as "a more compelling showing of inequity or hardship" than what the other subsections of the rule require. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988). Thus, Rule 60(b)(6) is applicable when the party seeking relief is able to demonstrate that the reason for relief is not embraced within the provisions of subsections (1) through (5) and that exceptional circumstances exist which warrant relief. *See, e.g., Ackermann v. United States*, 340 U.S. 193, 199 (1950) (extraordinary circumstances required for Rule 60(b)(6) relief); *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975) (Rule 60(b)(6) requires extraordinary circumstances and more than the reasons expressed in subsections (1) through (5)); *John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co.*, 239 F.2d 815, 817 (3d Cir. 1956).

Landano's request to reopen the court's prior judgment in this case cannot be characterized as simply being based upon newly discovered evidence pursuant to Rule 60(b)(2) or upon the misconduct of an adverse party pursuant to Rule 60(b)(3). Landano alleges that exculpatory evidence was suppressed by the State during all stages of his prosecution and post-conviction appeals and that this evidence was only recently discovered by him through continued investigation by his counsel.[3]

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[3] Rule 60(b) also requires that motions for relief under the rule be brought within a "reasonable time". What constitutes a "reasonable time" under the rule is to be decided under the circumstances of each case. *Delzona Corp. v. Sacks*, 265 F.2d 157, 159 (3d Cir. 1959). Given that the petitioner only recently

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Landano's allegations are not simply that there was misconduct by the prosecution or that he inadvertently discovered new evidence; rather, he claims that his constitutional right to the disclosure of exculpatory evidence was violated by the failure of the prosecution to turn over certain items in its possession and control. This is not merely a matter of reopening a money judgment in a civil action – the petitioner's liberty is at stake. The court concludes that "something more" than what is required under the provisions of subsections (1) through (5) has been demonstrated by Landano and thus that his request to reopen the prior ruling of this court is properly considered under the provisions of subsection (6), which covers "any other reason justifying relief."

A review of the cases which have considered whether circumstances are sufficiently "extraordinary" for Rule 60(b)(6) relief to be available shows that the present action is one in which Rule 60(b)(6) relief is particularly appropriate.

In *Klapprott, supra,* the Supreme Court held that a default judgment which stripped the petitioner of citizenship was properly vacated under Rule 60(b)(6) when, at the time of the judgment, the petitioner was incarcerated, was facing medical and financial hardships, and was acting *pro se,* another case involving denaturalization, the

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became aware with any particularity of the exculpatory evidence set forth in the present application, the court concludes that the present motion was brought within a "reasonable time" pursuant to Rule 60(b).

Court held that Rule 60(b)(6) relief is appropriate where "exceptional circumstances," such as those in *Klapprott*, are present. However, the Court held that such exceptional circumstances did not exist in *Ackermann*, because the petitioner had been represented by counsel at the denaturalization proceedings and had voluntarily chosen not to appeal the decision. Thus, *Ackermann* is distinguished from *Klapprott* by the fault of the petitioner in *Ackermann* in failing to timely assert his grounds for relief on direct appeal.

The leading Third Circuit decision in which the circumstances were deemed to be "exceptional" and thus to warrant Rule 60(b)(6) relief is *Boughner v. Secretary of Health, Education & Welfare*, 572 F.2d 976 (3d Cir. 1978). In that case, plaintiffs' attorney failed to file opposition to summary judgment motions and the motions were granted as unopposed. The attorney had been involved in a campaign for a judgeship, his secretary had left, and he had a large backload of cases; so large, in fact, that at the time over fifty motions against his clients were left unopposed. The court held that these facts demonstrated "neglect so gross that it is inexcusable," *id.* at 978, and concluded that the requirements of Rule 60(b)(6) had been met. The court stated:

> In reaching our decision that the circumstances here are sufficiently exceptional and extraordinary so as to mandate relief pursuant to Rule 60(b)(6), we are not unmindful of the need for judicial eagerness to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments. However, these commendable aspirations should never be used to thwart the objectives of the blind goddess.

Id. at 978-979. *See also United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977) (holding Rule 60(b)(6) relief appropriate where more than "mere neglect" was shown by attorney, who suffered mental disorder).

Although the court did not determine which subsection of Rule 60(b) was applicable to its decision, the Third Circuit held in *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987), that exceptional circumstances justifying relief under Rule 60(b) existed. The court emphasized that

> Burkett was a diligent, incarcerated habeas petitioner, repeatedly transferred from jail to jail; that affirmative behavior of the court induced him to await notification by the court for a reasonable length of time; that he learned of the entry of judgment too late to apply for relief under Rule 4(a)(5); that he promptly sought relief under Rule 60(b) within 30 days of learning of the entry of judgment; and that respondents have shown no prejudice.

Id. at 1217. Thus, at least for the purposes of extending the time to appeal, where a petitioner has been diligent and not at fault with respect to the need to reopen a judgment, Rule 60(b) relief is appropriate.

In *Moolenaar v. Government of the Virgin Islands*, 822 F.2d 1342 (3d Cir. 1987), two years after a judgment had been entered the plaintiff moved to reopen based on newly discovered evidence and inadequate representation of counsel. The action had involved the question of whether certain property was covered under a lease from the government to plaintiffs and the plaintiffs' attorney had possessed but not presented evidence that the property *had* been intended to be included in the lease. The court held that the circumstances were not extraordinary

enough for Rule 60(b)(6) relief, stating: "the present case does not present any extraordinary circumstances. The Moolenaars simply failed to present evidence which was available to them from the outset." *Id.* at 1347. However, the Third Circuit distinguished *Chicago & E. Ill. Railroad v. Illinois Central Railroad*, 261 F. Supp. 289 (N.D. Ill. 1966), a case which, according to the court, clearly presented extraordinary circumstances. The Third Circuit indicated that in *Illinois Central Railroad* the court, not the parties themselves, had been responsible for the failure to present evidence which had been available at the original hearing. Thus, Rule 60(b)(6) relief is not appropriate if the evidence in support of reopening the judgment was available at the time of the original proceedings. Such relief may be available, however, if the failure to present such evidence is not the fault of the party seeking to reopen the judgment.

In addition, the court has held that Rule 60(b)(6) relief is not available if it serves merely as a substitute for appeal. As the Third Circuit stated in *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977), "it is improper to grant relief under Rule 60(b)(6) if the aggrieved party could have reasonably sought the same relief by means of appeal." (Citations omitted.) In that case, the district court had, on its own motion, reexamined its prior ruling over two years after it had been entered and concluded that an error of law had been made. The Third Circuit found that the *pro se* plaintiff had understood his ability to appeal the district court's ruling and had failed to do so, and thus that it had been an abuse of discretion to grant Rule 60(b)(6) relief. *See also*

Ackermann, supra, at 198; *In re Fine Paper Antitrust Litigation,* 840 F.2d 188, 194-95 (3d Cir. 1988).

In the present action, Landano clearly is not attempting to use Rule 60(b)(6) as a substitute for appeal, since the court's original judgment was the subject of a timely appeal. In addition, the facts asserted by Landano in his motion to reopen were clearly unavailable to petitioner during the original habeas corpus hearing. Although these facts were available to defendants, they were not presented to the court and the failure to present them was due entirely to the fault of the prosecution in suppressing the evidence during the state court proceedings and thereafter. If the gross negligence of the party's own counsel is grounds for Rule 60(b)(6) relief, as in *Boughner, supra,* then surely the suppression of evidence by the State in violation of a criminal defendant's constitutional rights, in combination with the absence of traditional notions of finality in habeas corpus proceedings, is sufficient to warrant the application of Rule 60(b)(6) to this action.

The failure to consider Landano's Rule 60(b) motion would certainly result in prejudice to plaintiff, since any delay in reaching the merits of his petition is inherently prejudicial while Landanc remains incarcerated. In contrast, very little, if any, prejudice can be asserted by the State, since the Habeas Corpus Rules permit successive petitions and thus the State must always be prepared to respond to new demands for habeas corpus relief.

The court's discretion in deciding motions under Rule 60(b) is predicated upon serving the interests of justice. The court cannot conceive of circumstances more

"extraordinary" than those presented here, where a prisoner presents evidence that he was convicted without the benefit of exculpatory evidence and that such evidence was not available to him until the time of his motion for relief under Rule 60(b) because of the failure of the State to meet its obligation to turn over such evidence. Landano should not be deprived of the opportunity to present evidence of the suppression of exculpatory materials simply because the State successfully suppressed such evidence until after his habeas corpus application was heard and decided by this court. The court will grant Landano's motion to reopen the court's prior judgment pursuant to Rule 60(b)(6).

II. Exhaustion of State Remedies

As a second threshold matter, the court must address the government's contention that Landano has circumvented his obligation to exhaust available state remedies before seeking collateral relief in this court. The exhaustion requirement, which is codified at 28 U.S.C. Section 2254(b), seeks to afford state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). The doctrine is principally designed to protect the state courts' role in the enforcement of federal law and to prevent disruption of state judicial proceedings. *Rose v. Lundy*, 455 U.S. 509, 518 (1982). *See Duckworth v. Serrano*, 454 U.S. 1, 2 (1981) (per curiam) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal

rights"). In general, a "mixed" petition containing both exhausted and unexhausted claims must be dismissed. *Rose, supra,* at 519.

Although the rule is one of careful discretion rather than of jurisdiction, *see, e.g., Bond v. Fulcomer,* 864 F.2d 306, 309 (3d Cir. 1989), the Third Circuit has instructed that it "is not a mere formality." *Gibson v. Scheidemantel,* 805 F.2d 135, 138 (3d Cir. 1986).

The Supreme Court and the Third Circuit have set forth the following standards to guide the determination of whether a habeas petitioner has satisfied the exhaustion requirement. In *Picard v. Connor,* 404 U.S. 270, 275-78 (1971), the Supreme Court stated that once the "substance" of the federal claim has been "fairly presented" to the state courts, the exhaustion requirement is satisfied. Subsequent Third Circuit decisions have further delineated the "fair presentation" requirement. First, the "method of analysis" asserted in the federal court must have been "readily available to the state court." *Zicarelli v. Gray,* 543 F.2d 466, 472 (3d Cir. 1976) (en banc) (quoting *Stanley v. Illinois,* 405 U.S. 645, 658 n.10).

Second, the substance of the claim asserted in state court must be indistinguishable from the claim asserted in the federal court. *See Bisaccia v. Attorney General of State of New Jersey,* 623 F.2d 307, 312 (3d Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980) (because substance of due process claim presented to state court was "virtually indistinguishable" from federal claim, Picard test for exhaustion met); *see also Zicarelli, supra* (sixth amendment claim based on venue is not equivalent to sixth amendment claim based on fair cross-section analysis).

Third, the petitioner must have presented to the state courts both the legal theory and the facts on which the legal claim rests. *Gibson, supra, Compare Chaussard v. Fulcomer,* 816 F.2d 925, 928-29 (3d Cir. 1987), *cert. denied,* 108 S.Ct. 139 (1987) (argument section in petitioner's brief in state Supreme Court proceeding, which relied on federal constitutional cases and asserted that prosecutor's knowing use of perjured testimony violated fourteenth amendment and due process clause, fairly presented federal claim to state courts) *with Zicarelli, supra,* at 474 (mere reference by defendant's counsel to an opinion containing a constitutional claim did not fairly present sixth amendment cross-section issue to the state courts).

In this case, an order of this court has enabled Landano to discover and present facts not heretofore available to him. A failure to make every factual argument in state court to support a federal claim does not constitute a failure to exhaust. *See Patterson v. Cuyler,* 729 F.2d 925, 929 (3d Cir. 1984)[4]; *see also Bright v. Williams,* 817 F.2d 1562, 1565 (11th Cir. 1987) (once petitioner places legal theory and supporting facts before state court, he is not precluded from raising additional facts in support of claim in federal habeas petition, citing *Patterson*); *Zicarelli, supra,* at 474, n. 31 ("[w]ithin the contours of a particular argument . . . not every detail need have been put before the state court in order to present all facets of the argument

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[4] *Patterson's* separate holding, that 28 U.S.C. Section 2254(d)'s presumption of factual correctness applies to mixed questions of law and fact was "effectively overruled" by Miller v. Fenton, 474 U.S. 104, 108 n. 3 (1985). *Carter v. Rafferty,* 826 F.2d at 1306 n. 2.

to the federal court on a petition for habeas") (citation omitted). This court must determine whether the new facts presented by Landano fundamentally alter the legal claim already considered by the state courts. *Vasquez, supra,* at 260.

The government argues that Landano has not exhausted his available state remedies with respect to his claims arising out of evidence recently discovered in the files of the Hudson County Prosecutor and several police departments. For the first time, Landano asserts the following facts: (1) a photograph of Victor Forni was selected by eyewitnesses named Basapas or Pasapas and Christopher Calabrese, and Landano was never so informed; (2) two eyewitnesses, including Joseph Pascuiti whose testimony was critical to the prosecution, observed a photograph of Landano and told investigators that he was *not* the man they saw on the day of the crime, and Landano was never so informed; (3) an unknown investigator reported an unknown eyewitness as having identified Victor Forni as the driver of the getaway car; this report was written on the outside of a Hudson County Prosecutor's envelope with references to three photographs, none of which are contained in the envelope, and Landano was never so informed; and (4) the government has failed to preserve other evidence, including photographs used in displays and fingerprint reports.

The government concedes that Landano has exhausted his claims with respect to (1) whether the prosecution suppressed exculpatory evidence showing that Raymond Portas selected a photograph of Victor Forni; (2) whether the prosecution suppressed exculpatory evidence showing that prosecution witness Jacob Roth was

coerced into identifying Landano; (3) whether the prosecution suppressed exculpatory evidence relating to the involvement of Officer Snow's son in the Breed, the motorcycle gang which was linked to the robbery and murder.

The government also concedes that Landano asserted "in general terms" that the state had fabricated evidence against him and suppressed evidence against Forni. However, the government insists that the assertion of this "general theory" does not satisfy the exhaustion requirement. The government catalogs each discrete issue raised in the state courts with respect to prosecutorial misconduct. In the government's view, Landano focused on misconduct regarding the identifications made by Roth and Portas, and other crimes evidence with respect to co-defendant Allen Roller. The government argues that none of these issues related to the Basapas/Pasapas and Calabrese identifications or the other newly discovered evidence now before this court. Specifically, the government argues that Landano's prior claims regarding witness identifications of Forni were restricted to such an identification by Portas and no one else. Moreover, the government contends that Landano's claim necessarily requires a determination of whether certain documents were turned over to defense counsel. In the government's view, the state courts should be given the first opportunity to decide that factual issue.

Landano contends that he consistently raised in the state courts the legal claim that the state suppressed inculpatory evidence with respect to Forni and that the state fabricated evidence implicating Landano. Specifically, Landano insists that he argued in the state courts

that the state suppressed evidence of Forni's role as an active, rather than conspiratorial, participant in the murder of Officer Snow.

In support of this contention, Landano offers the following excerpts from his Brief in Support of Petition for Post-Conviction Relief, submitted to the state courts in 1981:

> . . . the Court will find the following factual pattern emerging – a pattern that explains the pressure brought to bear on Portas and Roth and that involves the most blatant violation of petitioner's constitutional rights:
>
> – Within days of the crime, New Jersey police, working in cooperation with other agencies including the FBI, focused their attention on a group of individuals associated with a motorcycle gang known as the Breed, as suspects in the crime.
>
> – Three such suspects were Allen Roller, Victor Forni, and Bruce Reen. All were associated with the Breed.
>
> – One such suspect, Victor Forni, fit the physical description offered by eyewitnesses of the man who shot and killed Officer Snow. Evidence suppressed by the prosecutor and offered by the defense as the basis for a previous motion for a new trial reveals that Forni was suspected by New Jersey authorities of having actively participated with the Breed in armed robberies prior to the Kearny incident. A gun traced to Forni was used to kill Snow.
>
> – When Allen Roller, a former president of the Breed, was apprehended, he implicated the petitioner, Mr. Landano, as the killer of Officer Snow in an effort to protect the true perpetrator,

someone within the Breed; Landano had no association with that gang and never knew Roller. At trial, Roller admitted that the Breed visited violence on Breed associates who implicate others in crimes.

– Physical and eyewitness testimony did not support Roller's claim that Landano was the killer. He had neither a pencil-thin mustache nor a full head of curly hair on the day of the crime two physical characteristics attributed by relevant eyewitnesses to the killer. Rather, he had straight hair and a full bushy mustache.

– Forni was apprehended in New York City.

– Landano, too, was arrested in New York City.

– Forni's lawyer successfully fought extradition for approximately two years. Landano was almost immediately extradited; a partially forged affidavit was used by the prosecutor as part of his successful effort to extradite Landano.

– The prosecutor was under tremendous pressure to obtain a rapid conviction of the killer of Officer Snow. Forni, the key suspect, was unavailable. Mr. Landano became the target of the investigation.

– Eyewitnesses were pressured, cajoled, or led into identification of Mr. Landano. In some cases no record was made of eyewitness identification of Forni.

– Ultimately, a conviction was obtained on the basis of such constitutionally defective eyewitness testimony.

– The prosecutor's efforts to overreach for a conviction of Mr. Landano merged neatly with the Breed's efforts to frame him in order to protect the Breed perpetrators.

> No conviction should be allowed to stand on such a record.

(Mullin Cert., Exhibit R). Landano also points to other portions of the brief which argued that procedures used in securing Portas, identification violated federal and state law, citing, among other cases, *Brady v. Maryland*, 373 U.S. 83 (1963). Landano maintains that he raised the issue of suppression of evidence of Forni's guilt in federal due process terms at the State post-conviction hearing.

Landano also submits that he attempted to obtain further factual support for his contentions through discovery requests which were, in large part, denied by the state courts. Notably, Landano sought to depose Prosecutor Mulcahy; this request was denied. (Mullin Cert., Exhibit S). Landano argues that the documents now before this court would have been discovered had the state court permitted him to take the prosecutor's deposition.

In Landano's petition for certification to the New Jersey Supreme Court, he argued as follows:

> . . . Mr. Landano has made a very substantial claim of innocence. It emerges from facts surrounding this case that the actual murderer of Officer Snow was a co-defendant, Victor Forni; that the prosecutor was unable to extradite Mr. Forni from New York at a time when the prosecutor's office was under enormous pressure to obtain a conviction for the killing of Police Officer John Snow; and that the prosecution, yielding to such pressure, joined the perpetrators of this crime in framing Mr. Landano as the alleged killer of Officer Snow. . . . This case provides an opportunity to give its imprimatur to the Appellate Divisions's very important ruling in *State v. Thomas* . . . holding that an accumulation of

> prosecutorial misconduct compels overturning of a defendant's conviction in accordance with the Fourteenth Amendment of the United States Constitution.

(Mullin Cert., Exhibit U, at 7-8).

After scrutinizing the facts and law presented to the state courts in this matter, the court concludes that Landano's federal claim was fairly presented to the state courts for purposes of exhaustion. It is not disputed that Landano set forth a claim that the prosecutor had suppressed exculpatory evidence in violation of his due process rights under *Brady v. Maryland, supra*. Thus, it is clear that the same method of analysis now propounded was readily available to the state courts.

As to whether the "substance" of the federal claim was asserted in the state courts, the government concedes that Landano has consistently contended in both state and federal courts that Forni committed the murder of Officer Snow. (Transcript of Oral Argument, at 32). But the government insists that "[t]o raise in a statement of facts that you believe that somebody else is the guilty individual does not cover every possible legal issue that could arise." (*Id.* at 33). The government does not fairly characterize either the scope or the significance of Landano's arguments that are set forth in his post-conviction petition brief. Landano did not merely say that *someone else* was guilty. Landano argued, *inter alia*, that (1) a particular person, Victor Forni, was the murderer; (2) Forni fit the description of eyewitnesses who saw the murderer; (3) the gun that killed Officer Snow was traced to Forni; (4) the prosecutor was under tremendous pressure to obtain a rapid conviction of the killer of Officer

Snow; (5) Forni was successfully fighting extradition and was unavailable for immediate trial; (5) the prosecutor suppressed evidence that Forni was suspected of *active* involvement in other armed robberies carried out by the Breed; (6) the prosecutor pressured eyewitnesses into identifying Landano and made no record of several eyewitness identifications of Forni. In sum, Landano, with remarkable acuity under the circumstances, called the state court's attention to "a pattern . . . that involves the most blatant violation of petitioner's constitutional rights." As set forth hereinafter, documents in the sole possession of the prosecutor and his investigators, concealed from Landano until this court ordered that all files be opened for inspection, demonstrate a pattern of prosecutorial misconduct that indeed involves a blatant violation of Landano's constitutional rights. It is clear to this court that Landano asserted the substance of his federal claim in the state courts.

As to whether Landano presented both the legal theory and the supporting facts to the state court, it is unquestionable that he clearly articulated his legal theory. In his post-conviction brief, Landano explicitly relied upon *Simmons v. United States*, 390 U.S. 377 (1968), and *Brady v. Maryland, supra*, to support his claim that the prosecutor had violated his constitutional rights. Landano cited *Simmons* with respect to his contention that the prosecutor had "grossly violated federal and state standards governing admissibility of eyewitness identification testimony." (Mullin cert., Exhibit R, at 95). Landano cited *Brady* with respect to his contention that the prosecutor suppressed evidence in violation of "long established federal and state norms governing the prosecutor's

obligation to provide the Defense prior to trial with exculpatory evidence." *Id.* at 95-96. The lengthy excerpt from Landano's post-conviction brief, quoted *supra*, also presents the facts supporting his legal claim that the prosecutor suppressed exculpatory evidence (including evidence that tended to implicate Forni as the killer) in violation of his *Brady* due process rights. These facts clearly support Landano's legal theory that the prosecutor overreached and suppressed evidence in violation of his *Brady* due process rights.

It is true that Landano raised these constitutional claims of prosecutorial suppression without raising the facts that were recently discovered. The only remaining question is whether the submission of such additional facts in this court necessitates that Landano return to state court. The court concludes that such a return is not required because the newly-discovered facts do not alter Landano's federal claim; indeed they are completely consistent with his claim. Moreover, such a return would be grossly unfair because the facts supporting the renewed application for a writ of habeas corpus were themselves concealed by the government and not available for Landano to assert in the prior proceedings.

As this court reads the Supreme Court's decisions in this area, the manner in which new evidence is discovered or brought to a federal court's attention is noteworthy. For example, in *Townsend v. Sain*, 372 U.S. 293, 317 (1963), the Court held that where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary

hearing. Although Townsend did not bear on the exhaustion issue, as correctly pointed out by the government, it is clear that the Court was disturbed that a crucial fact, known only to the government, was not disclosed at the state-court hearing. *Id.* at 321-22. More recently, the Court held that evidence submitted at the direction of the district court did not fundamentally alter petitioner's claim that his indictment was invalid due to discrimination in the grand jury selection process. *Vasquez, supra,* at 258. The *Townsend* and *Vasquez* decisions both noted that the new evidence was not the result of the petitioner deliberately by-passing state proceedings. *Townsend, supra,* at 317; *Vasquez, supra,* at 260. Indeed, the *Rose* Court summed up its view of the exhaustion doctrine as follows:

> . . . our interpretation of Sections 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.

455 U.S. at 520. Landano followed this instruction as best he could; it cannot be said that he deliberately by-passed any state procedures. His failure to present the specific facts that are now before this court was not due to his own negligence or oversight; rather, the documents upon which such contentions are based were in the sole possession of the prosecutor and his investigators. Indeed, he vigorously sought to obtain information in the possession of the prosecutor.

Moreover, this is not a case in which the state courts had no indication that the prosecutor had violated Landano's due process rights by suppressing exculpatory

evidence. See *Bisaccia, supra*, at 311.[5] The state courts had an opportunity to consider Landano's claim of prosecutorial misconduct and were presented with the factual assertions from which Landano argued that such misconduct had occurred. Landano had no way to allege or demonstrate how widespread and well-hidden the misconduct was in this case. Notably, Landano sought to depose the prosecutor. It is quite possible that such a deposition would have led to the discovery of some of the errors of omission and commission that are set forth at length *infra*. Based on the factual assertions and discovery requests made by Landano, the state court could have been expected to offer Landano an opportunity to further substantiate his claim of prosecutorial misconduct such that the state could have adjudicated the claim.

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[5] Thus, this case is distinguishable from *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 94 n. 17a (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978), wherein the exhaustion requirement was not met because the state courts "had *no* opportunity – let alone a fair one" to decide petitioner's *Brady* claim. In contrast to the *Trantino* decision, Landano clearly provided the state courts with an opportunity to decide his claim. This case is also distinguishable from *Pitchess v. Davis*, *supra*, at 490, wherein the Supreme Court held that petitioner, after having previously obtained a conditional writ based on a *Brady* violation, had failed to exhaust with respect to the claim (that the underlying exculpatory material had been destroyed) which formed the basis for his application for an *unconditional* writ. In *Pitchess*, petitioner's federal unexhausted claim was presented to the state court in a pretrial motion, the denial of which the petitioner sought to review prior to trial by means of unsuccessful extraordinary writs filed in state appellate courts. *Id.* at 484. *Cf. Castille v. Peoples*, 489 U.S. ___, 109 S.Ct. 1056 (1989) (raising new claim only to state's highest court on discretionary review

(Continued on following page)

Having determined that the issue of prosecutorial suppression of favorable evidence was fairly presented to the state courts, this court must also be satisfied that it may decide Landano's renewed habeas petition on the basis of the new evidence now before it. The government correctly points out that resolving the merits of Landano's petition requires a determination of whether exculpatory material was suppressed and if so, whether such suppression was material under *Brady*. The question is whether such a determination must be made in the first instance by the state courts. This court agrees with the analysis set forth by the Eighth Circuit in *Austin v. Swenson*, 522 F.2d 168, 170 (8th Cir. 1975), *aff'd after remand* 535 F.2d 443 (8th Cir. 1976), wherein the appellate court vacated the district court's dismissal on non-exhaustion grounds. The *Austin* court ruled that the district court should have resolved the petitioner's *Brady* claim upon the record developed in a federal evidentiary hearing, noting that newly disclosed police reports which exculpated the petitioner were not available to petitioner in the state proceedings. *Id.* at 170. The court observed that "a

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does not constitute fair presentation). In contrast to the *Pitchess* and *Castille* decisions, Landano raised his claim not in an extraordinary request for discretionary review but in consistent applications for post-conviction relief. *Pitchess* is further distinguishable from the present action in that the constitutional analysis regarding the destruction of evidence differs from the *Brady* analysis regarding the suppression of evidence. *See Arizona v. Youngblood*, 109 S.Ct. 333 (1988); *California v. Trombetta*, 467 U.S. 479 (1984). Here, the court's review of the newly asserted facts does not involve a different legal standard, as all of the facts considered by the court are facts relating to the suppression of exculpatory evidence in violation of *Brady*.

due respect for comity does not require that federal proceedings be halted each time the state produces additional evidence potentially favorable to the petitioner." *Id.* at 170 n.5. In this case, it matters little that the newly-discovered material was disclosed without an evidentiary hearing. A federal determination is warranted because petitioner raised the general claim of prosecutorial suppression in the state courts previously and because exculpatory material was wrongfully withheld by the prosecution throughout the state proceedings.

The exhaustion doctrine does not require that state courts be given more than one opportunity to consider federal habeas claims. Habeas Corpus Rules 7 and 8, respectively, provide for expansion of the record and for evidentiary hearings. Clearly, such rules contemplate that federal courts will often decide habeas cases on the basis of a record which includes materials that were not considered by the state courts, without undermining the policies served by the exhaustion doctrine. As the Third Circuit recently stated:

> State courts are certainly entitled to have the first opportunity to review federal constitutional challenges to state convictions. . . . There is no requirement, however, that they be given more than one opportunity to adjudicate these claims. [The petitioner] has given the state court their first opportunity, and they did not seize it.

Keller v. Petsock, 853 F.2d 1122, 1130 (3d Cir. 1988) (citation omitted) (deeming that exhaustion requirement satisfied); *see also Jones v. Superintendent of Rahway State Prison*, 725 F.2d 40, 42 (3d Cir. 1984) ("[o]ne such opportunity is

sufficient"). In this case, the state courts had a fair opportunity to address Landano's claim of prosecutorial suppression and misconduct, and thus it is not necessary for Landano to now return to state court with additional facts in support of his claim.

Furthermore, the nature of Landano's *Brady* claim distinguishes this case from most other exhaustion cases. Landano alleged throughout the state court proceedings that Forni was the actual killer and that the prosecutor had suppressed (1) evidence inculpatory with respect to Forni and (2) evidence exculpatory with respect to Landano. The unavailability of the specific facts that have now been uncovered was due to the prosecutor's suppression, and Landano's request to confront the prosecutor at a post-conviction deposition was denied by the state court. Thus, the discovery of additional evidence supporting a consistent claim of prosecutorial suppression, when it brings to the federal court's attention exculpatory evidence that has been concealed, does not support a defense of non-exhaustion. *See United States ex re. Merritt v. Hicks*, 492 F. Supp. 99, 106 (D. N.J. 1980) (comity not served by deferring determination of petitioner's *Brady* claim based on exculpatory police report discovered during federal habeas proceeding); *see also Monroe v. Blackburn*, 476 U.S. 1145, 1148-51 (1986) (Marshall, J., dissenting from denial of certiorari) (forcing petitioner to return to state court upon discovery during federal habeas proceeding of suppressed *Brady* material "removes from the State any incentive to make timely disclosure of material, exculpatory evidence and trivializes the constitutional right recognized in *Brady* and its progeny").

Given the factual contentions and legal claims presented to the state courts in this matter, this court concludes that the state courts were afforded a meaningful opportunity to consider Landano's allegations of legal error. Landano has satisfied the exhaustion requirement.[6] This court will address the merits of his petition.

III. Merits of Landano's Petition

A. Brady Doctrine.

The basis for Landano's renewed application for habeas relief is his contention that the prosecutor suppressed exculpatory, material evidence in violation of his due process rights.

The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions comport with prevailing notions of fundamental fairness. This standard of fairness has been consistently interpreted by the Supreme Court "to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court examined the obligation of a prosecutor

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[6] In light of the pattern of prosecutorial suppression of material, exculpatory evidence that has now been exposed after more than a decade, *see infra* at 46, this court also concludes that the exhaustion requirement should be excused in this case on the basis of "exceptional circumstances of peculiar urgency," *Rose, supra*, at 515, and to prevent a "miscarriage of justice." *Granberry v. Greer*, 481 U.S. 129, 135; *see also Monroe, supra*, at 1148-51.

to disclose exculpatory information to a criminal defendant. The Court held that a defendant's due process right to a fair trial is violated when the prosecution withholds evidence that is both favorable to the accused and "material either to guilt or punishment." *Id.* at 87.

Under the *Brady* line of cases, a prosecutor is responsible for knowing what evidence appears in his or her files, even if such evidence has actually been overlooked. *Agurs*, 427 U.S. at 110; *State v. Carter*, 91 N.J. 86, 111 (1982). The knowledge of a police officer investigating a crime is imputed to the prosecutor, *see Giglio v. United States*, 405 U.S. 150 (1972), and thus any materials found in police files which are favorable to plaintiff and material to his guilt or punishment should be turned over whether the prosecutor was aware of them or not.[7] *See Monroe v. Blackburn*, 476 U.S. 1145, 1149 (1986) (Marshall, J., dissenting from denial of *certiorari*) ("[t]hat the information lay undisturbed in the files of the police and not those of the prosecutor should make no difference"); *see also State v. Carter*, 69 N.J. 420, 429 (1976) (where police officer was in charge of investigation and participated in trial of the case, his knowledge was imputable to the prosecutor); *Hall v. State*, 374 N.E.2d 62 (Ind. 1978) (prosecution's files encompass all material within its control, including material located in files of police conducting investigation).

The obligation to turn over exculpatory evidence under *Brady* has been held not to have been violated where

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[7] Thus, the court's use of the term "prosecutor" in this opinion does not necessarily refer to Hudson County Prosecutor Thomas Mulcahy.

it was shown that the evidence was known to the defendant or to defense counsel. *See Hughes v. Hopper*, 629 F.2d 1036 (5th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). However, the defendant must have been aware of the *exculpatory nature* of the evidence as well as the mere existence of the evidence. *See. e.g., United States v. Griggs*, 713 F.2d 672 (11th Cir. 1983) (per curiam). Thus, the fact that a defendant knew of the existence of a particular witness is not enough to preclude a finding of a *Brady* violation if any exculpatory statements given by the witness were withheld from the defense.

Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial, and the existence of such a probability would constitute constitutional error warranting reversal of a defendant's conviction. *United States v. Bagley*, 473 U.S. 667, 678-682 (1985) (Blackmun J., concurring). Thus, under *Brady*, a prosecutor is required to disclose that evidence favorable to the accused which, if suppressed, would deprive the defendant of a fair trial. *Carter v. Rafferty*, 826 F.2d 1299, 1304 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 711 (1988). The *Brady* rule has been subsequently interpreted to include a duty on the part of the prosecution to disclose impeachment evidence as well as exculpatory evidence, since such evidence is favorable to the defendant and, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676.

In order to determine the "materiality" of a given piece of evidence, the court must consider "the strength or fragility of the state's case against [the defendant] as a whole." *Carter*, 826 F.2d at 1308. As noted by the Supreme Court in *United States v. Agurs*, "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of minor importance might be sufficient. . . ." 427 U.S. 97, 112-13 (1976).

Having set forth the relevant standard of constitutional review, the court will next consider the factual assertions made by Landano in support of his request for habeas corpus relief.

B. Factual Contentions Relating to Habeas Relief

1. Prosecutorial bad faith.

At Landano's trial, the prosecution relied on the testimony of four crucial witnesses: Jacob Roth, Allen Roller, Raymond Portas, and Joseph Pascuiti. The court has already concluded in its prior opinion that (1) a State agent involved in the prosecution of Landano made an impermissibly suggestive statement to Raymond Portas prior to his courtroom testimony; (2) the prosecutor suppressed information about co-defendant Allen Roller's additional criminal activities; and (3) the prosecutor suppressed information concerning a police investigation of Jacob Roth's business dealings. 670 F. Supp. at 577-588. In other words, this court has already determined that the prosecution either committed affirmative acts of misconduct or breached its *Brady* obligation with respect to three of

the State's four key witnesses against Landano. In the instant application, it is further disclosed that the prosecutor did not turn over a police report which could have further impeached Roth, or a Hudson County Prosecutor envelope which memorializes an apparent eyewitness identification of Forni as the getaway car driver. (Mullin Cert., Exhibits E, I). There is no question that the record in this matter exposes a pattern of failures by the prosecution in this case to live up to its good faith duty to turn over exculpatory information. This pattern supports the position asserted by Landano from the outset that the prosecution suppressed evidence exculpatory to him and inculpatory of Forni. Although the court recognizes that the good or bad faith of the prosecutor is irrelevant with respect to a *Brady* due process analysis, *see Brady*, 373 U.S. at 87, such considerations certainly are relevant to the credibility of the government's response to Landano's claims of suppression of particular items of evidence, which the court now addresses.

2. First Ground warranting Relief: Negative Identifications of Landano by Pascuiti and Calabrese.

Landano submits a handwritten document obtained from the Kearny police files. (Mullin cert., para. 14, Exhibit 0). The document lists the names of five individuals and reads as follows:

ID on Landano

Joe Pascuto* – hair not right – suspect had curley hair

Liloia

BASF – nothing

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* The state concedes that "Pascuto" is a misspelling of Joseph Pascuiti.

Gorudine

Rest. girl & Guy –
J&B – **younger looking**
Calabrese Chris – coffee truck – hair not right – more curley
Jack Roths statement page 3

(emphasis added).

Landano contends that this document was probably conveyed to the prosecutor and reflects the comments of at least two witnesses, Pascuiti and Calabrese, who viewed his photograph and said that Landano did not look like the perpetrator. Landano argues that the absence of any accompanying records supports an inference that the witnesses were improperly shown *only* Landano's photograph. Landano also notes that both Calabrese and Pascuiti described the perpetrator as having curly hair. Landano submits that both Calabrese and Pascuiti "are describing Victor Forni." (Plaintiff's Brief, at 8).

The government counters that the document does not purport to list identifications made in this case, but "appears to be handwritten notes made by an unknown individual regarding the identification evidence uncovered in the investigation." (Government Brief, at 21). As to Pascuiti, the government states that several reports available to defense counsel reflected that Pascuiti had made several inconclusive identifications. (*See* Government Exhibits 6, 16, 17). The government also highlights one statement by Pascuiti wherein the perpetrator is described as having hair that is "curly, fairly thick" (Government Exhibit 18). However, there is nothing in the record to demonstrate that this statement was turned over to defense counsel.

In addition, the government points to the defense counsel's cross-examination of Pascuiti at trial, wherein Pascuiti testified that the perpetrator had curly hair. (Government Exhibit 19, at 100). The government submits that Pascuiti admitted on cross-examination that he had identified a photograph of Victor Forni in a photo display, and that defense counsel remarked that the photograph was of a man with curly hair. (*Id.*, at 101-103).[8]

In order to determine whether Landano's arguments are sufficient to establish a due process violation pursuant to *Brady* and its progeny, the court must first determine whether or not evidence favorable to Landano was suppressed by the government. *Brady*, 373 U.S. at 87. If the court concludes that suppression occurred, the court must then evaluate whether or not such evidence is material by determining whether, had it been disclosed to the defense, there is a reasonable probability that the outcome of Landano's trial would have been different. *Bagley*, 473 U.S. at 682 (Blackmun, J., concurring).

a) Suppression

Landano's *Brady* claim with respect to this asserted "negative" identification of Landano by Pascuiti turns on whether the handwritten note in Exhibit 0 supports an inference that Pascuiti indeed was shown a photo of Landano by police investigators and rejected it. If this

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[8] Although not mentioned by the government, the prosecutor immediately brought out, on redirect, that Pascuiti did not actually select any photograph from the display in question. (Government Exhibit 19, at 103).

court were to infer that some other scenario could explain the basis for the "Pascuto" entry, thereby focusing only on the substance of Pascuiti's comments that the perpetrator had curly hair, the force of Landano's assertion would be blunted. Landano acknowledges that defense counsel was given an unsigned statement by Pascuiti indicating that the killer had curly hair. (Smith Cert., Exhibit F). The trial testimony confirms that defense counsel knew that Pascuiti had described the perpetrator as having curly hair. Thus, a first glance at the "Pascuto" entry by itself does not appear to suggest that the prosecutor's failure to turn this information over to Landano constitutes a *Brady* violation.

At this point, the other entries, particularly that of Calabrese, take on tremendous significance. As to the *substance* of Calabrese's reported comments in Exhibit 0, Landano reiterates his contention that this information, if not material in itself, doubtless would have led to the discovery of material evidence. Landano points out that in none of the statements taken by Calabrese did he indicate that the suspect's hair was *curly*. The government reiterates its position that the record reflects that Calabrese identified a photograph of Forni and one of Landano, and that he was known to defense counsel as an identification witness for the state. Notably, the government does not argue that Landano was ever apprised that Calabrese had described the suspect as having curly hair. Nor does the government acknowledge that naming Calabrese as a potential witness for the prosecution, while withholding information that Calabrese had remarked that the suspect had curly hair, was at best misleading,

and may have constituted a violation of Landano's due process rights. *See Griggs, supra,* at 674.

If the substance of Calabrese's reported comments is disturbing, the *manner* in which they are transcribed is momentous. Exhibit 0 reads, in pertinent part, as follows: "ID on Landano . . . . Calabrese Chris – coffee truck – hair not right – **more curley [sic].**" (emphasis added). The court cannot ignore the clear import of the words "more curley [sic]." Calabrese is not reported as having merely said that the suspect had curly hair. Calabrese is reported to have said the suspect had "*more* curley [sic] " hair, suggesting that he is comparing his recollection of the suspect to a *photograph*. Therefore, Exhibit 0 clearly supports an inference that Calabrese was shown a photograph of Landano and told an unknown government investigator that the man he served the morning of the crime had "more curley [sic] " hair.

The impact of the words "more curley [sic] " does not end with Calabrese, for it appears that at least one and perhaps two other witnesses "J & B," listed on Exhibit 0, responded "younger looking," again suggesting a *comparison* with a photograph of Landano. What is most significant is the inclusion of Joseph Pascuiti on this list. The entries on Exhibit 0 support an inference that the document was prepared by an agent of the prosecution and that it memorializes the reactions of the witnesses listed to a photograph of Landano. Beyond the specter that the investigator(s) may have illegally confronted eyewitnesses with a single photograph of Landano[9] is the plain

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[9] Identifications arising from single-photograph displays are viewed with suspicion, see *Simmons v. United States,* 390 U.S. 377, 383 (1968), since such procedures are bound to be suggestive.

inference that Pascuiti was shown and rejected that photograph. The court concludes that the above inference is justified by the content of Exhibit 0 itself. It is clear to this court that Landano was not informed that Pascuiti had rejected his photograph. The court's conclusion that a negative identification of Landano by Pascuiti was suppressed by the government is further supported by the pattern of prosecutorial suppression of evidence exculpatory to Landano referred to *supra* at 46.

b) Materiality

The government argues that because this handwritten note may not have been admissible at trial, the prosecutor cannot be deemed to have committed a *Brady* violation. *See United States v. Oxman*, 740 F.2d 1298, 1311 (3d Cir. 1984) ("to be material, evidence suppressed must have been admissible at trial"), *vacated and remanded, United States v. Pflaumer*, 473 U.S. 922 (1985) (in light of the Court's decision in *Bagley, supra*), *on remand*, 774 F.2d 1224 (3d Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). However, it is not only the suppression of this note that implicates Landano's right to a fair trial; rather, it is the failure of the prosecution to make the negative identification known to Landano prior to his trial. Although the note found in the government's files (Exhibit 0) may be all the proof that now remains, the clear inference from it is that several key witnesses were shown photographs of Landano and rejected them because the perpetrator's appearance differed from that of Landano. The prosecution's failure to disclose the substance of these negative identifications constitutes a suppression of evidence and deprived Landano of valuable exculpatory evidence. To

hold otherwise would reward the prosecutor for failing to create or for destroying exculpatory evidence.

As noted *supra*, the court must evaluate the strength of the State's case against the defendant as a whole in order to determine the "materiality" of a given piece of suppressed evidence. *Carter*, 826 F.2d at 1308. The court prefaces its discussion of the materiality of the negative identification evidence by noting that consideration of the case against Landano "as a whole" necessarily includes the court's conclusions in *Landano*, 670 F. Supp. at 585, 588, regarding the suppression of evidence which could have impeached the testimony of Roller and Roth at trial.

In its prior opinion, this court noted that two witnesses testified that the killer of Officer Snow was also the driver of the getaway car. The prosecutor has already been found to have suppressed *Brady* material with respect to Allen Roller, one of those two witnesses. The court could not find a *Brady* violation, however, because there was a second witness, Pascuiti, who testified that the killer and driver were one and the same, and a third witness, Portas, who had identified Landano as the driver. Now, the record supports an inference that the prosecutor suppressed *Brady* material with respect to Pascuiti's negative identification of Landano which, in turn, calls into question the credibility of Portas' identification. Exhibit 0 clearly supports an inference that the prosecutor suppressed exculpatory evidence which would have supported Landano's affirmative defense that Forni was the murderer.

On direct examination, Pascuiti testified that, although he did not have a full face view of the perpetrator, he saw that the same dark-haired man who pointed the gun at Officer Snow drove the getaway car. (Smith Cert., Exhibit D, at 8.94, 8.96). On cross examination, Pascuiti testified that the perpetrator had short curly hair. (*Id.* at 8.100). Pascuiti also testified that he had picked a photograph of Victor Forni "as most resembling" the perpetrator. (*Id.* at 8.103). On re-direct examination, Pascuiti qualified this statement and testified that he had not selected any photographs from the display in question. (*Id.*).

Had defense counsel been apprised of the negative identifications reflected in Exhibit 0, Pascuiti could have been confronted with his apparently negative identification of Landano. The defense could have used this information to argue to the jury that Pascuiti had ruled out Landano as the person who murdered Officer Snow and who drove the getaway car. If the jury accepted Pascuiti's prior rejection of Landano as the murderer and driver of the getaway car, the State's case against Landano unravels. The evidence at trial linking Landano to the crime consisted of the testimony of Portas, the truck driver who did not observe the murder and only testified as to the identity of the driver of the getaway car after it had left the scene of the crime, and the testimony of Roller and Roth. In its prior opinion, the court held that the suppression of evidence which impeached the testimony of Roller and Roth was not material in light of the other evidence linking Landano to the murder. That "other evidence" is now called into question, and thus the court's materiality determination regarding the suppression of impeachment

evidence against Roller and Roth must also be reevaluated. Such impeachment evidence becomes material when considered in light of facts indicating that Pascuiti, the State's only witness to the shooting, may have ruled out Landano as the murderer.

Against the above backdrop, the court concludes that there is a substantial probability, in light of all the facts which came out at trial and which are now known to have been suppressed by the government, that the jury's verdict would have differed had Pascuiti's negative identification of Landano, in combination with the evidence tending to impeach Roller and Roth, been brought out at trial. Exhibit 0 thus provides grounds for this court to rule that the judgment of conviction in this matter is constitutionally infirm.[10]

In addition, the court concludes that there is a second, independent ground for habeas relief.

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[10] On habeas review, the role of this court is simply to determine whether petitioner's original trial satisfied the due process requirements of the federal constitution. Should Landano be retried, the unavailability of evidence suppressed by the prosecutor in the first trial is a matter for the state courts to address. *See Pitchess, supra,* at 490 (federal courts do not maintain continuing supervision over retrial conducted pursuant to a conditional writ of habeas corpus). If, due to the passage of time or the failure to maintain government files, no other evidence of these negative identifications is available, it is for the state court in the first instance to determine (a) the admissibility of the handwritten note found in Exhibit 0, and (b) the legal consequences of the government's failure to document and preserve the identification procedure and results referred to in the handwritten note.

3. **Second Ground warranting Relief: Basapas/Pasapas Identification of Forni.**

As a separate ground in support of his request for habeas corpus relief, Landano submits a Kearny [sic] Police Department Continuation Report submitted by Detective Edward Rose, which contains the following entry, dated January 19, 1977:

> . . . . I then stopped at the Modern Transporttation [sic] and spoke to Joseph Pasapas [sic] who requested to see more pictures. He was shown the 17 picture spred [sic] #21529 to 21544 and he picked out #21532 Victor Forni as resembling the man who drove the car away. [sic] from the scene of the holdup on 8/13/76.

(Mullin cert., Exhibit H). One copy of this report was located in the Kearny [sic] Police Department files, and two copies were located in the Hudson County Prosecutor's files. (Mullin cert., para. 9). None of the files searched contained a photograph of Forni signed by Basapas/Pasapas[11] and there is no statement signed by Basapas/Pasapas. Landano argues that these circumstances demonstrate that such documents either were not created intentionally or they were later destroyed.

The government first contends that, regardless of its significance, this report was not suppressed. In support of this contention, the government offers the following: Several copies of the report were still found in the files of the prosecutor and the police department. One copy was discovered in the files of Victor Forni's defense attorney.

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[11] Because it is difficult to ascertain whether the first letter of the witness's last name is "P" or "B", the court will refer to the witness as "Basapas/Pasapas."

A letter from Prosecutor Mulcahy to Landano's defense counsel indicates that Landano received supplemental discovery from the State on March 11, 1977. (Government Exhibit 5). This discovery included "Continuation reports from Kearny [sic] Police Department." According to the government, "it seems reasonable to infer" that the report was turned over to defense counsel before trial.

The government also relies on the proceedings at trial to support its belief that the Basapas/Pasapas Continuation Report was given to the defense. At oral argument, the government pointed out that four witnesses, all of whom are named in the Report, testified at trial that they had looked at photograph displays in January of 1977. (Transcript of Oral Argument, at 22-23). Landano's defense counsel did not bring to the trial court's attention that he had not been informed that such identification procedures had been conducted in January 1977. The government asserts that this silence on the part of defense counsel reflects that he did, in fact, have a copy of the Report. Moreover, defense counsel himself elicited from Joseph Pascuiti on cross-examination that he had viewed a photograph display in January 1977, supporting the government's contention.

The government next characterizes the identification in question as "tentative" since the report states that Forni "resembled" the driver of the getaway car. The government also disputes Landano's assumption that a photograph was signed or a statement was taken from Basapas/Pasapas, apparently arguing that no such action would be taken on the basis of a tentative identification.

Although conceding that neither Detective Rose nor Prosecutor Mulcahy recollects who Basapas/Pasapas is, (Rose Affidavit, para. 3, Government Exhibit 3; Mulcahy Cert., para. 7, Government Exhibit 1), the government submits that Joseph Basapas/Pasapas is in fact Joseph Pascuiti, who testified at trial. Prosecutor Mulcahy indicates that on a copy of the report located in the prosecutor's files, the word "Basapas/Pasapas" is apparently crossed out, with the word in his handwriting that appears to be "Pascuiti" inserted. (Government Exhibit 15; Mulcahy Cert., para. 7, Government Exhibit 1). Prosecutor Mulcahy, in an attempt to reconstruct an explanation for the insertion, speculates that he must have ascertained that the original entry of Basapas/Pasapas was a misspelling of Pascuiti. (Mulcahy Cert., para 7).

The government weakly offers an account of how the Basapas/Pasapas entry may have been created. Because no address or telephone number accompanies the entry, the government infers that Detective Rose had already taken down such information on a previous interview of Pascuiti. To explain how the word "Pascuiti" could be so mangled into "Basapas/Pasapas", the government guesses that Detective Rose must have been careless. (Transcript of Oral Argument, at 21). Detective Rose speculates that it might have been a typographical error. (Rose Affidavit, para. 4).

The government also suggests that Pascuiti's trial testimony mirrors the information contained in this report, arguing that "Pasapas, like Pascuiti, picked out Victor Forni as resembling the man who drove the car away from the scene of the holdup on August 13, 1976." (Government Brief, at 17). Further, the same photograph

of Forni was selected by both Pascuiti and Basapas/ Pasapas. (Transcript of Oral Argument, at 26).

In reply, Landano maintains that he never received a copy of the Kearny [sic] Continuation Report. (Mullin Cert., para. 24; Landano Cert., paras. 4-5). Landano rejects the government's contention that the Mulcahy letter of March 11, 1977 reflects that he was given a copy of the Basapas/Pasapas report. In so arguing, Landano relies on the fact that on March 30, 1977, an exhaustive document discovery list was given to defense counsel. (*Compare* Government Exhibits 5 and 6). This March 30 list includes more than thirty Kearny [sic] Continuation Reports, with references to dates, page lengths, and detectives who completed them. Notably, the list does not include the Basapas/Pasapas report or any report for 1977. Landano argues that the record supports his contention that neither he nor his counsel received any 1977 Kearny [sic] Continuation Reports. Landano notes that Prosecutor Mulcahy does not directly dispute this contention.

Landano also states that the word "resembling" in the report does not render the identification by Basapas/ Pasapas tentative. Landano submits that when identifications were tentative, Kearny [sic] detectives so noted with clear language to that effect. The report at issue does not include any words of reservation.

Landano submits that the government's theory that Basapas/Pasapas is in fact Pascuiti results from the government's willful distortion of the record. First, Landano points out Pascuiti worked at Modern *Warehouse*, located

at 42 Jacobus Avenue, whereas Basapas/Pasapas was interviewed at Modern *Transportation*, located at 75 Jacobus Avenue. (Robbins Cert., para. 2).

Second, Landano charges that the government has mischaracterized Pascuiti's trial testimony. Responding to the government's contention that the cross-examination of Pascuiti shows that defense counsel had been given the Report, Landano points out that defense counsel's attempt to establish that Pascuiti had selected Forni from a photo display was immediately rebutted by the prosecutor on re-direct, wherein he brought out that Pascuiti had *not* selected any photographs from the display. The Continuation Report at issue reflects that Basapas/Pasapas did in fact select a photograph of Forni. Thus, if Basapas/Pasapas is Pascuiti, Landano argues, the prosecutor suborned perjury on re-direct and concealed the fact that the only eyewitness to the murder had identified Forni as the killer.

If the state's theory is wrong, and Basapas/Pasapas is not Pascuiti, Landano then argues that the government has suppressed the statement of a heretofore unknown witness that would have directly rebutted Portas' claim that Landano drove the getaway car. Such evidence would constitute *Brady* material, Landano argues, the suppression of which warrants a reversal of his conviction.

Landano submits that "Basapas/Pasapas" is in fact Gus Lapas, who sold coffee from his truck along Jacobus Avenue in Kearny [sic]. Lapas often sold coffee at Modern Transportation, stopping there daily. On the day of the murder, Lapas' truck was almost hit by a car fleeing a

crime scene. Lapas recalls going to the prosecutor's office to look at photographs of suspects. Lapas' memory of the events is not good, and he does not recall whether he selected any photographs. (Lapas Cert., paras. 1-5, Exhibit F to Second Mullin Certification).

Landano notes that "Gus Lapas" has more letters in common with "Basapas/Pasapas" than does "Pascuiti". Landano also points out that Lapas stopped on a daily basis at Modern Transportation, which is named in Exhibit H, whereas Pascuiti was employed at Modern *Warehouse*. Landano also contends that no records in the government's files reflect that Lapas ever gave statements at the prosecutor's office, and he suggests that reports of interviews with Lapas, including Exhibit H, were suppressed. To counter the State's argument that Basapas/Pasapas is really Pascuiti, Landano argues that Pascuiti's testimony did not focus on the driver of the getaway car; rather, he described the actual shooting. On the other hand, Lapas, like Basapas/Pasapas, identified the *driver*. Landano suggests that Detective Rose might have *chosen* to misspell Lapas's name, to conceal his identity in the event Landano was acquitted so that Forni could later be tried as the actual triggerman.

a) Suppression

Prior to considering the merits of the parties' arguments as to the identity of "Basapas/Pasapas", it is first necessary to address the issue of whether the Kearny [sic] Continuation Report labeled Exhibit H was turned over to defense counsel. The court's inquiry is somewhat hampered by the fact that Landano's trial counsel, Mr. Flynn,

is deceased. However, both Neil Mullin, who has represented Landano for many years and certifies that he is familiar with discovery provided by the prosecutor in the state proceedings, (Mullin cert., para. 24), and Landano himself, who has actively participated in his defense since his arrest, (Landano Cert., para. 2), certify that Exhibit H was not turned over to the defense. The government, which created this document, offers no record that specifically states that Exhibit H was turned over but states that it "believe[s]" (Brief, at 43) that the Report is included in a list of documents turned over under cover of a March 11, 1977 letter by Mulcahy. (Government Exhibit 5). The prosecutor's letter, even if authentic, states only that unspecified Continuation Reports were turned over.[12] The prosecutor himself now has no recollection of the document, or whether it was even in his control, and he has no present recollection of any such witness by the name of Joseph Basapas. (Mulcahy Cert., para. 7). On the other hand, an exhaustive and detailed discovery list, which identifies with particularity such Continuation Reports, does not mention Exhibit H.

The court is not persuaded that the trial proceedings support the government's contention that the Report was not suppressed. First, the government concedes that none of the four witnesses selected Landano from any photograph array, *see* Transcript of Oral Argument, at 24,

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[12] The fact that other materials identified in the Mulcahy letter may have been introduced at trial or were in the possession of defense counsel does not establish that Exhibit H was among the Kearny [sic] Continuation Reports which may have been turned over.

making it less likely that defense counsel would complain at the time of trial that he had never been notified of the photo arrays shown in January of 1977 with respect to those four witnesses. Second, one of the four witnesses who viewed photographs in January 1977 was a *defense* witness. *Id.* at 23. It is likely that defense counsel ascertained prior to trial that photographs had been shown at least to that witness, and inferred that photographs had been shown to other potential witnesses. Thus, defense counsel was on notice that the government had shown photographs to one witness in January 1977 and knew that Pascuiti had leaned towards a photograph of Forni in August 1976 and had stated that the killer had curly hair. (Landano Cert., para. 8). This lends credence to Landano's certification that defense counsel broached the topic of a January 1977 photograph selection of Forni by Pascuiti *without* the benefit of Exhibit H. Moreover, the fact that defense counsel did not confront Pascuiti with the Continuation Report on re-cross supports the contention that he did not have the report in his possession.

The record clearly supports an inference that Exhibit H was not turned over to the defense prior to or at trial. This conclusion is reinforced by the numerous instances, discussed *supra*, in which the prosecutor suppressed other exculpatory evidence or information.

b) Materiality

Having carefully reviewed the record and the respective factual assertions and legal arguments of counsel, the court now assesses the significance of Exhibit H with

respect to Landano's *Brady* claim. Landano has demonstrated that he was not apprised before trial that an eyewitness selected a photograph of Victor Forni as the driver of the getaway car and therefore as the actual killer of Officer Snow. The record does not establish whether the witness named in Exhibit H is in fact Joseph Pascuiti, Gus Lapas, or some other unknown individual. The lack of certainty regarding the identity of the witness is the fault of the government, and no one else. The government offers only strained inferences, and no proof, that Basapas/Pasapas is in fact Pascuiti. For example, the government's explanation for the Basapas/Pasapas entry that it was made on a follow-up interview of Pascuiti and that the misspelling was the result of carelessness is difficult to accept. The striking difference between "Pascuiti" and "Basapas/Pasapas" undermines Detective Rose's speculation that the error was typographical; a simple look at a typewriter's keyboard reveals the implausibility of such an explanation. Furthermore, it is almost inconceivable that the detective would not know, in January of 1977, five months after the murder, the correct name of the only witness who saw the murder. Conversely, the government has not proved that Basaspas/Pasapas is *not* a person heretofore unknown to the defense.

The significance of Exhibit H is clear, regardless of the actual identity of "Basapas/Pasapas". If the person or persons named in the documents are *not* Joseph Pascuiti, then the prosecutor concealed the fact that a heretofore unknown witness identified Victor Forni as the driver of the getaway car. This evidence would have directly rebutted Raymond Portas' testimony that Landano was the

driver. Therefore, if Basapas/Pasapas is not Pascuiti, then there is a reasonable probability that the outcome of Landano's trial would have been different because the jury would have been faced with conflicting testimony regarding the identity of the driver. This testimony, combined with the wrongfully suppressed impeachment evidence against Roller and Roth, was material to Landano's defense and could have rebutted the State's case against Landano.

If the person named in Exhibit H *is* Joseph Pascuiti, then the state suppressed information that would have assisted in the defense's attempt to attack Pascuiti on cross-examination. The court's review of the transcript supports a clear inference that defense counsel was not privy to the fact that Pascuiti had selected a photograph of Forni. Defense counsel elicited a tentative admission that Pascuiti had selected such a photo, but was unable to counter the prosecutor's immediate re-direct establishing that Pascuiti had not in fact selected a photo of Forni. Had Exhibit H been available to the defense, defense counsel would in all likelihood have confronted Pascuiti with the Continuation Report which reflects that the eyewitness actually selected a numbered photograph of Victor Forni as resembling the driver of the getaway car. The prosecutor's failure to provide this report crippled the defense's attempt to establish that Forni was the actual killer. Therefore, if Basapas/Pasapas *is* Pascuiti, then the court also concludes that there is a reasonable probability that the outcome of Landano's trial would have been different.

Regardless of the identity of the eyewitness named in Exhibit H, the prosecutor's failure to disclose or turn over

this document constituted a violation of Landano's right to due process of law and deprived him of a fair trial.[13]

CONCLUSION

Having made an exhaustive review of the applicable law and existing facts in this matter, the court deems it appropriate to comment on the human factors here at stake. Concerns of compassion and humanity may not be appropriate in determining whether or not the court has the obligation to defer to the state court and require the petitioner to submit his claims there in the first instance. However, petitioner's incarceration for more than a decade, coupled with the distinct possibility that he, indeed, may be innocent of the charges for which he was convicted, are additional considerations supporting the relief granted herein. Requiring him to return to the state

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[13] In light of the court's conclusion that each of the two aforementioned constitutional violations requires that the writ be granted, it is not necessary to discuss in detail the other issues raised in Landano's petition. These other contentions refer to (1) a "Property and Evidence Report," listing a photograph of Victor Forni, which was stapled to a statement by Raymond Portas; (2) a Newark Police report reflecting that Jacob Roth was questioned about possible payments to Officer Snow; (3) a handwritten note listing an identification of Forni by a witnesses named "Papasavas"; (4) photographs and statements signed by Christopher Calabrese; (5) a Hudson County Envelope memorializing a identification of Forni as the getaway car driver; and (6) materials no longer maintained in the prosecutor's files. Although several of these contentions are relevant to the issue of prosecutorial bad faith, the court concludes that none serves as an independent basis for this court to void Landano's conviction on constitutional grounds.

courts and start the process of review again would be unduly cruel and insensitive.

The court in this opinion has walked the path of existing authority and visited the historical precedents which, it respectfully submits, allow the action which it now takes, and which permit it to conclude that petitioner is entitled to immediate, not eventual, relief from the constitutional wrongs committed against him. Compassion may have no role in interpreting the law in our system of justice, but there can be no justice without it.

For the above reasons, this court will grant Landano's motion to vacate its order of September 29, 1987, which denied Landano's petition for habeas corpus relief. The court will grant Landano's petition and will issue a conditional writ of habeas corpus directing respondents John J. Rafferty, Superintendent of the East Jersey State Prison, and the State of New Jersey to release plaintiff Vincent James Landano from custody unless plaintiff is afforded a new trial to commence within 90 days of the date of the issuance of the writ.[14]

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Dated: July 27th, 1989

Original to Clerk, U.S. District Court

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[14] Any application for release pending appeal or retrial should be made, in the first instance, to the state courts. If no action is taken within 30 days of said application, this court will entertain petitioner's application for enlargement under Fed. R. App. P. 23.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, vs. JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, Respondents.	Civl Action No. 85-4777 ORDER (Filed Sep 29, 1987)

This matter having been opened to the court upon the application of petitioner, Vincent James Landano, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and this court having heard oral argument and having considered the written submissions of all parties, and for the reasons set forth in the accompanying opinion filed this day.

IT IS this 29 day of September, 1987 hereby

ORDERED that petitioner's application for a writ of habeas corpus is denied; however, it is further

DETERMINED that there is probable and significant cause for appeal.

/s/ H. Lee Sarokin,
H. LEE SAROKIN, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, vs. JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, Respondents.	Civil Action No. 85-4777 OPINION (Filed Sep 29, 1987)

SAROKIN, District Judge

The murder of a police officer is a tragic event, not only for the loss sustained by the officer's family, but because it is the ultimate symbol of lawlessness. That tragedy is compounded however, if there is a risk that an innocent person has been convicted of such a despicable crime. The record in this case demonstrates that there is just such a risk, but because of binding precedent this court is powerless to grant the relief which petitioner seeks and to which this court believes he is entitled.

A critical prosecution eyewitness, a public spirited citizen who came forward with evidence immediately after the crime, now once again has voluntarily come forward to cast doubt upon petitioner's conviction and his own testimony which may have caused it.

Although discussed in more detail hereafter, the witness, Raymond Portas has testified under oath that (1) when he was first asked to identify the driver of the automobile (the driver being identified by others as the murderer) some months after the crime from a photo array, he selected someone other than the petitioner Mr. Landano; (2) that photograph was removed by the police never to be seen or identified again; (3) that incident is corroborated by the fact that two photos are missing from that array and their absence is unexplained; (4) thirteen days later while waiting to testify, Mr. Landano and his attorney walked by Mr. Portas and he did not recognize Mr. Landano; (5) an officer informed Mr. Portas with respect to these two persons that one was "our man"; (6) even then, Mr. Portas did not know which of the two was the alleged perpetrator; (7) he only made that determination by process of elimination – when the lawyer rose to speak, he concluded the remaining person was the one he was to identify, which he did.

His qualms of conscience were not slow in festering. Immediately upon the conclusion of his testimony he considered speaking to the judge. Doubting its propriety, he sought out the counsel of a priest, who assured him that the police knew what they were doing and not to be concerned. His concerns were allayed but never completely extinguished. He undoubtedly took comfort from the fact that other evidence existed which supported the conviction which was subsequently entered.

However, years later, in reading a magazine article about the case, he learned that much of the other evidence was suspect and realized that his testimony rather

than being merely corroborative was crucial to the outcome. All of his qualms were reawakened. Again acting out of the purest and most honorable of motives he went not to the defendant or his counsel, but rather to the prosecution to express his concerns and doubts. The prosecutor's office turned a deaf ear to his entreaties, and then and only then, did he communicate with the defense after first tracking down the author of the magazine article to ascertain defense counsel's identity.

True there are some discrepancies and inconsistencies in Mr. Portas' testimony and contrary evidence offered by the prosecution. But on the critical facts Mr. Portas has not waivered since he brought these matters to the attention of the parties. He is an honorable, intelligent and obviously conscientious person. He has no reason or motive to lie. His self doubts were not the result of a lengthy process or intercession by anyone, but followed immediately upon his testimony – even before the conviction.

This court conducted a hearing and found the testimony of Mr. Portas to be believable. If the jury had heard what he has now revealed, it might never have convicted the petitioner. On the other hand, the state court found Mr. Portas' testimony on these matters to be incredible; and denied a new trial. The obligation of this court to defer to the factual findings of the state court makes it impossible to grant the relief sought. The court candidly admits an exhaustive search for grounds to grant the writ, but could find none without violating the court's oath to follow existing precedent. In upholding the law, the court fears that a great injustice has occurred and respectfully invites reversal of its decision.

PROCEDURAL HISTORY

Petitioner, Vincent James Landano, comes before this court seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On October 6, 1976 petitioner was indicted by a Hudson County Grand Jury on one count of felony murder (N.J.S.A. 2A:113-1 and 2), three counts of armed robbery (N.J.S.A. 2A:141-1 and 1A:151-5), one count of breaking and entering with intent to steal (N.J.S.A. 2A:94-1), one count of receiving a stolen motor vehicle (N.J.S.A. 2A:139-3), one count of illegal possession of a firearm (N.J.S.A. 2A:151-41) and one count of conspiracy to commit armed robbery (N.J.S.A. 2A:98-1). Also named in the indictment were three co-defendants, Allen Roller, Victor Forni and Bruce Reen.

On April 6, 1977, the prosecution of co-defendants Forni and Reen, each of whom was then confined in New York and contesting extradition, was severed from that of petitioner and codefendant Roller.

On April 18, 1977, Roller entered a plea of *non vult* to the felony murder charge alleged in the first count of the indictment pursuant to a plea agreement reached with the Hudson County Prosecutor. The agreement provided that Roller would testify against petitioner at trial.

The following day, April 19, 1977 petitioner's trial began before the Honorable Maurice A. Walsh, Jr., J.S.C., and a jury. Following 19 days of trial, on May 17, 1977 petitioner was found guilty on all counts. As a result of the jury's verdict, the court sentenced petitioner to life

imprisonment on the felony murder count and a consecutive seven to fifteen year term for the remaining offenses.

Petitioner filed a Notice of Appeal on June 29, 1977. On September 26, 1978, petitioner filed a motion in the Superior Court of New Jersey, Appellate Division seeking remand to the trial court for consideration of a motion for a new trial on the basis of newly discovered evidence. An order granting that motion was subsequently entered by that court on October 17, 1978.

On November 20, 21 and 27, 1978 evidentiary hearings pursuant to petitioner's new trial application were conducted before Judge Walsh. By opinion and order dated December 1, 1978, Judge Walsh denied petitioner's application. Thereafter, on March 21, 1980, the Superior Court of New Jersey, Appellate Division denied both petitioner's direct appeal and the consolidated appeal from the denial of a motion for new trial. Landano's petition for certification was denied by the New Jersey Supreme Court on July 8, 1980. *See State v. Landano*, 85 N.J. 98 (1980).

On March 31, 1982, petitioner filed a verified petition for post-conviction relief and supporting brief. Hearings pursuant to this petition were conducted before the Honorable Joseph P. Hanrahan, J.S.C. on June 16, September 22, October 6 and 28, and November 17, 1982. Judge Hanrahan issued a series of letter opinions concerning the numerous issues raised and ultimately denied the relief sought in an order dated January 4, 1984.

Petitioner appealed Judge Hanrahan's ruling to the Appellate Division. On January 30, 1984, that court denied petitioner's appeal. On June 13, 1984, the Supreme Court of New Jersey denied certification.

On October 10, 1985, petitioner filed the instant habeas corpus petition. Having properly exhausted the available state remedies, petitioner's application is ripe for disposition by this court.

As grounds for relief petitioner alleges: (1) that his due process rights to a fair trial were infringed by the admission of Raymond Portas' identification testimony; (2) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of codefendant Allen Roller; (3) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of Jacob Roth, victim of the armed robbery; and (4) that the state court's coercive charge to the jury violated the petitioner's Sixth Amendment right to an impartial jury.[1]

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[1] Petitioner's original application included an allegation that the state unlawfully suppressed information of Gregory Snow's involvement in the instant crime; information which petitioner claims would have been both exculpatory and material. However, this court notes that Judge Hanrahan in his opinion denying petitioner's post-conviction relief application specifically found that "[a] police report referring to Officer Snow's son's involvement in this trial was made available to [petitioner] prior to trial". Counsel for petitioner does not dispute that such report or reports were available at trial but contends that additional information exists, namely, a taped interview. However, the existence of the tape was known to defense counsel at the time of trial as it is referred to in the

(Continued on following page)

FACTS

The underlying facts may be distilled from the many state court opinions. The events leading up to the crime for which petitioner was convicted involved the activities of a "motorcycle gang" known as "The Breed". According to testimony at trial by Breed members and affiliates, the Breed frequently planned an executed armed robberies in the Staten Island area. Testimony at trial revealed that in June 1976 Allen Roller, president of The Breed's Staten Island chapter, together with Victor Forni, not a "Breed" member but reputedly responsible for organizing most Breed criminal endeavors, conceived a plan to rob the Kearny, [sic] New Jersey Check Cashing Service owned and operated by Jacob Roth.

Though it was undisputed at trial that petitioner, Vincent James Landano, was neither a Breed member nor a Breed affiliate, co-defendant Roller testified that petitioner had been specifically recruited for this job when another Breed affiliate refused to participate. Roller admitted that Forni and not petitioner was responsible for orchestrating the Kearny [sic] robbery, but Roller vigorously denied Forni's participation in the crime's execution. Roller's testimony revealed that petitioner was a

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(Continued from previous page)

reports that were produced upon discovery. *See* Habeas Corpus petition, dated October 9, 1985 at 27. In light of the fact that counsel was free to request such information, and that the state was acting in good faith by disclosing the tape's existence, the court finds that this claim is not the proper basis for habeas corpus relief. Therefore, the court will focus its attention on the other claims enumerated.

long standing friend of Forni's and that Forni had suggested recruiting Landano for this job.

In the early morning hours of August 13, 1976, Allen Roller together with a "dark-haired" associate who Roller identified as the petitioner arrived at the Hi-Way Cash Checking Service. Roller testified that he approached the window of the Roth check cashing trailer, forced his way into the trailer and controlling the occupants with his gun, proceeded to steal the available cash.

During this time a Newark patrol car driven by Patrolman John Snow arrived in the Roth parking lot. The dark haired perpetrator approached the vehicle and opened fire at close range killing Officer Snow. Thereupon the perpetrator reached inside the vehicle and removed an attache case containing $46,000 intended for delivery to Hi-Way Checking.

Roller testified that the two immediately returned to their vehicle and sped away from the crime scene with petitioner driving and Roller in the back seat. According to Roller, petitioner confessed upon return to the car that he had had to "ice [or waste] the cop". It was later discovered that the gun used to kill Officer Snow was Forni's gun.

Joseph Pasciutti, [sic] an employee of an adjacent warehouse, testified that he had witnessed a dark haired man approach the patrol car in The Hi-Way Check Cashing parking lot. Pasciutti [sic] testified that he had momentarily turned away from the crime scene and that his back had been turned when he heard three or four gunshots. When Pasciutti [sic] redirected his attention to the check cashing facility, he testified that he saw a Chevy

pulling away and that the dark haired perpetrator was driving. Pasciutti was not able to identify petitioner as the dark haired perpetrator.

In an effort to escape the crime scene, the vehicle proceeded through Kearny [sic] and came upon a blocked intersection. The driver's frantic efforts to escape the traffic attracted the attention of Raymond Portas, a truck driver whose truck was stopped in the intersection. Portas testified that he viewed the vehicle maneuver onto nearby train tracks and proceed to drive along the rail. Though unable to identify Roller as the vehicle's passenger, Portas testified at trial that petitioner was the driver of the car.

The evidence presented against petitioner at trial included Roller's testimony naming Landano as his partner in crime; Pasciutti's [sic] testimony that the dark haired perpetrator responsible for killing Officer Snow was also the driver of the getaway car and Portas' identification of petitioner as the driver of the vehicle identified as the getaway car.

DISCUSSION

I. The Portas Identification

In bringing this habeas corpus application, petitioner alleges a deprivation of his due process right to a fair trial as a result of the improper admission of Raymond Portas' identification testimony. In large part, the basis for petitioner's motion results from information discovered subsequent to trial as the result of Mr. Portas' recantation of his trial testimony.[2]

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[2] Relying on the Supreme Court's holding in *Neil v. Biggers*, 409 U.S. 188 (1972), petitioner argues that without even

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The court begins its analysis by noting that Raymond Portas was a critical prosecution witness. Through the testimony of Joseph Pasciutti, an employee of an adjacent warehouse who witnessed the crime, the state was able to establish that the "dark-haired" perpetrator, responsible for killing Officer Snow, was the driver of the getaway

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reaching the merits of Portas' post-trial testimony and the undue influence alleged, the record supports a finding that it was error for the trial court to admit Portas' out of court identification. Addressing the reliability factors set forth in *Biggers*, petitioner contends that the lapse of eight months between the confrontation and Portas' photographic identification, Portas' momentary viewing of the perpetrators, Portas' inability to correctly identify Roller as the passenger and finally, Portas' description of petitioner as having no moustache, cumulatively compel a finding that there existed a significant likelihood of misidentification. This court cannot agree.

First, the *Biggers* analysis is only triggered where it can be illustrated that the identification procedure was suggestive. Reviewing the record devoid of Portas' recantation, there is no basis upon which to conclude that the photographic identification was suggestive. Portas testified at the *Wade* hearing that he had been shown an array of dark haired perpetrators (S-2) and that he was able to select petitioner's photograph without any prompting. While Portas admitted that the prosecutor had confirmed his choice remarking "That's him", there was no allegation prior to the recantation that this remark preceded or in any way influenced the identification. In view of the fact that at the time of the *Wade* review Portas demonstrated certainty in his identification of petitioner and further that Portas testified to having had an unobstructed view of petitioner in close proximity and to having paid acute attention to the car's maneuvering; this court concludes that it was not a violation of due process for the trial court to have admitted Portas' identification on the record as it stood at the time of trial.

car. *See* Trial Transcript of April 28, 1977, VIIII at 90-92. Pasciutti [sic] however, was unable to identify petitioner as the driver; and, in fact, described the driver as having "curly hair" and "no moustache" whereas a photo or [sic] petitioner taken on the day of the crime, some hours after the shooting occurred, reveals Landano to have had long straight hair and a prominent, bushy moustache. *See* Trial Exhibit D-13. Raymond Portas was the only witness presented at trial who was able to identify petitioner as the driver of the car and thus create the inference that petitioner had killed Officer Snow.

Mr. Portas, employed as a truck driver in August 1976, testified at trial that on August 13, 1976 he had witnessed petitioner and another passenger as they drove through an intersection in Kearney. Portas testified that his attention had been drawn to this car because of its erratic driving pattern. The driver, seeking to avoid a blacked intersection, maneuvered the car onto nearby railroad tracks and proceeded to drive along the parallel tracks. According to Portas, due to the vehicle's backward maneuvering he had a more direct view of the driver than the passenger and was able to view the driver full face at a distance of approximately fifteen feet for a minute and a half. *See* Transcript of Portas Voir Dire testimony, April 25, 1977, at 48-50; Trial Transcript at 8.45.

At trial it was established that prior to his court appearance, Mr. Portas had had two opportunities to view photographs in an effort to identify the perpetrators of the crime. The first viewing took place on August 13, 1976, the day of the crime, at which time Portas was

asked to identify the backseat passenger. The record reflects that Portas erroneously identified William Applegate, and not co-defendant Roller.

Subsequently, on April 15, 1977, almost eight months after the crime and ten days before trial, Portas was summoned to the Hudson County Prosecutor's office. Portas testified that he was shown two groups of photos on this occasion, one of "men with beards" and the other of dark-haired perpetrators. *See* Trial Transcript, April 28, 1977, at 8.43 - 8.46; 8.59. Portas acknowledged having difficulty selecting the backseat passenger noting that the individual depicted looked "fatter" than he recollected. *See* Trial Transcript at 8.43.

However, of critical significance to the state's case, Portas testified that he was able to positively identify petitioner's photo from the second array. Trial Transcript at 8.45.[3] Portas testified that he believed petitioner to be the driver of the car. Trial Transcript at 8.46:1. In response to the prosecutor's inquiry "Do you see the man in court today who you believe to be the driver of the vehicle?", Portas responded affirmatively and identified the petitioner. Trial Transcript 8.46:9-14.

On cross-examination, Portas testified that after having identified petitioner's photo (marked S-2A for identification) in the prosecutor's office, a member of the prosecutor's staff present in the room confirmed the identification responding "Yes. That's him". Trial Transcript at

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[3] Portas identification of Landano was memorialized in a sworn statement executed with the assistance of Detective Frank Xavier on April 15, 1977.

8.62. On redriect [sic] examination however Portas averred that he was not given any indication of which photograph to select prior to his independent identification and that any confirming remark followed his independent selection. Trial Transcript at 8.63. Furthermore, the prosecutor elicited testimony establishing that Portas' in-court identification of the petitioner was based on his "recollection of the incident of August 13th [1976]" and not the product of any suggestion made to him upon selection of petitioner's photograph thirteen days earlier. Trial Transcript at 8.64:8-13.

In 1982, approximately five years after petitioner's trial, Portas came forward seeking to recant his testimony. Portas' recantation was made part of petitioner's application of post-conviction relief addressed to the New Jersey Superior Court. An evidentiary hearing was granted, and conducted by the Honorable Joseph P. Hanrahan in October 1982.

Portas' testimony at this post-conviction hearing differed from his trial testimony in two critical aspects: (1) Contrary to his prior testimony, Portas revealed that he was unable to independently identify petitioner's photo on April 15, 1977. On October 6, 1982 Portas recalled that upon being shown a series of photos of dark-haired perpetrators he first selected a photo of an individual other than the petitioner. According to Portas, the prosecutor "picked up the picture I picked out and handed it to the other fellow and he left the room". *See* Transcript of October 6, 1982 Evidentiary Hearing at 7. Portas further testified that to the best of his recollection, he never saw that photograph again. October 6, 1982 Hearing at 8.

Portas testified that after having removed this first selection, the prsoecutor [sic] allowed Portas to continue reviewing the remaining photographs while engaging him in causal conversation. Portas recalls that at one point he remarked to the prosecutor: "You know, if this man wasn't so fat, I would have picked him". October 6, 1982 Hearing at 8. According to Portas the prosecutor responded to this tentative selection by saying "That's the man we want" and asking Portas to initial the back of the photograph. October 6, 1982 Hearing at 9. This second photo was of the petitioner Vincent James Landano. In an affidavit sworn to by Mr. Portas, dated November 20, 1981, Mr. Portas certfied [sic] that "[i]f, on April 15, a detective had not said we think he is the one I would not have signed Landano's photograph". October 6, 1982 Hearing at 40.

(2) Portas testified that prior to his in-court identification of Mr. Landano he had been seated in the hallway outside the courtroom. Two gentlemen whom he describes as well-dressed passed him in the hallway. Portas testified on direct examination that he had not recognized the petitioner when petitioner passed him in the hallway. October 6, 1982 Hearing at 10-11. Immediately following, Mr. Portas entered the men's room where he was approached by a person whom he assumed to be a detective. According to Mr. Portas the detective asked him: "Do you know who the two were that just went in?". Without awaiting a response, the detective then remarked to Portas "You know, that's our man". October 6, 1982 Hearing at 10. Shortly thereafter, Portas entered the courtroom and identified the petitioner as the man he had seen driving the getaway car on August 13, 1976.

Mr. Portas testified that this "bathroom incident" in particular had given him great pause. He testified that he "was not sure" of his identification of the petitioner, not sure that he "shouldn't have told somebody that a policeman followed [him] into the bathroom to tell [him], to make sure [he] picked out the guy". October 6, 1982 Hearing at 15 and 17. Portas testified that he believed he had been "influenced" in his identification. *See* Transcript of October 28, 1982 Hearing at 53. In his own words, Portas explained "It's very hard to know whether you've been influenced or not, as far as I'm concerned. I don't know". October 6, 1982 hearing at 68.

As a result of this uneasiness, Portas testified that he considered going to see the judge immediately, but chose instead to contact his priest, Father Ashe. October 28, 1982 Hearing at 53. Portas' voluntarily applied to Father Ashe for assistance within a day or two of his tesimony [sic]; prior to return of a guilty verdict. Having been assured by his priest that the police and the prosecutor "know what they are doing"; Portas let the matter rest. It was not until the publication of a magazine article in the October 1981 issue of the New Jersey Monthly analyzing Landano's trial and depicting the conviction as having been based upon a paucity of evidence, that Mr. Portas' concerns were revived and he took the initiative in communicating with petitioner's counsel concerning a recantation.[4]

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[4] Portas testified that his initial effort was to contact the state with the information concerning the bathroom incident and the tampered photo identification. However, according to

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In an opinion dated December 3, 1982, the court denied petitioner's application for a new trial based on Portas' recantation. As set forth in the court's opinion, the state standard for evaluating a recantation upon a motion for a new trial is "whether it casts serious doubt upon the truth of the testimony given at the trial and whether, if believable, the factual recital of the recantation so serously [sic] impugns the entire trial evidence as to give rise to the conclusion that there resulted a possible miscarriage of justice". *State v. Puchalski*, 45 N.J.97, 107-8 (1965). Therefore, as a threshold matter the court had to find, as a matter of fact, that Portas' recanting statement was believable. Only upon such a factual determination could the court apply the requisite legal analysis and conclude as a matter of law that the trial testimony was so seriously impugned as to support the conclusion that there resulted a possible miscarriage of justice.

The court however, found Portas' testimony to be "untrustworthy" and therefore "lack[ing] the capacity to cast serious doubt upon the truth of his trial testimony". *See* State's Appendix, Volume II at 230A. Having observed Portas' "manner of expression, sincerity, candor and straightforwardness", the court explained that it had "received the impression that Mr. Portas [felt] that he 'pressed the button' that condemned Landano". *Id.* at 227A. After summarily reviewing the other evidence presented at trial, the court determined that Portas' concern

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Mr. Portas the prosecutor's office informed him that "they didn't think it mattered". *See* Transcript of October 6, 1982 Hearing, at 28.

for having single-handedly convicted Landano was "clearly without merit". *Id.* at 230A.

As to the bathroom incident, the court found: (1) that it was conceivable that a large number of people might have been in that hallway; (2) that there was no reason for Portas to have noticed the particular two men in question; (3) that Portas "assumed", but was not certain that the man who had followed him into the bathroom was a detective; (4) that Portas did not see these men go into the courtroom; (5) that Portas never stated that the gentlemen in the bathroom described or pointed out Landano and finally (6) that based on Portas' testimony, Portas was not certain that this gentlemen influenced him in his in-court identification of Landano. *Id.* at 228A.

As to the photo indentification [sic], the court concluded that "Mr. Portas without the slightest suggestion from any member of the prosecutor's staff selected Mr. Landano's photograph from one set of photographs and an accomplice's photograph from another set of pictures". *Id.* at 229A. The state court's opinion ignores or implicitly rejects Portas' testimony that he misidentified one of the dark-haired perpetrators depicted in the photo array prior to his tentative identification of Landano and further, that Portas would not have selected Landano's photo but for a *prior* suggestion by the prosecutor that "that's the man we want". However, given the inconsistencies in Portas' trial testimony and his testimony at the evidentiary hearing, this court must conclude that the state court's acceptance of Portas' trial description of the April 15, 1977 identification procedure implied a finding that Portas' subsequent testimony was not believable, and therefore undeserving of further analysis. *Id.* at 229A.

The court has reviewed the hearing and in particular the state's cross-examination of Portas. The court can well understand the state's interest in preserving a conviction once obtained, however that interest must be tempered by a respect for the rights and dignity of an impartial, law abiding individual who has come forward with evidence as a good citizen. In reading the transcript one could reasonably conclude that the witness had become the criminal. The examination was not a search for the truth but rather an exercise in harassment and intimidation in an effort to dissuade the witness from any recantation. The court respectfully suggests that the prosecutor's role though continuing to be an advocate should demonstrate as much interest in obtaining exculpatory as well as incriminating information in this type of post-trial proceeding.

During the course of that proceeding Mr. Portas was reminded eleven times that his prior testimony had been under oath. He became concerned about a perjury charge. *See* Transcript of October 28, 1982 Hearing at 52-53. No one ever sought to dissuade him from that concern. As a result this court determined to conduct its own hearing, assuring Mr. Portas that he was free to reject his trial testimony if he was truthful in doing so.

The power to require an evidentiary hearing in a federal habeas corpus proceeding is vested in the "sound discretion" of the district judge. *See Townsend v. Sain*, 372 U.S. 293, 318 (1963). A district court may order a plenary hearing even though one is not obligatory. The court, in this instance, based its decision to conduct an independent hearing on several factors. First, recognizing the

centrality of Portas' identification testimony to establishing petitioner as the driver of the getaway car and thus, by inference, the murderer, the court determined that it was appropriate to provide Portas with an uninhibited opportunity to proffer his recantation. Second, in light of newly discovered evidence raising a possibility that the photo Portas erroneously identified prior to selecting Landano, which according to Portas was subsequently removed, was that of Victor Forni, the court deemed it appropriate to confront Mr. Portas with a photograph of Forni.[5] Finally, given the state court's failure to make specific findings as to Portas' inability to identify Landano from the array of dark-haired perpetrators absent prompting by the state, this court determined that an additional, more in-depth explanation of the circumstances surrounding this incident was warranted.

Accordingly, on September 2, 1987, this court conducted its own evidentiary hearing of Raymond Portas.[6]

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[5] *See* May 12, 1987 Letter from Neil Mullin, counsel for Petitioner. On April 1, 1987 counsel for petitioner had an opportunity to review the Hudson County Prosecutor's files pursuant to an order of this court. Counsel discovered a document entitled "Property and Evidence Report" which reflects that on April 15, 1977, the day Portas was summoned to identify petitoner [sic], two (2) photographs of Victor Forni were removed from the prosecutor's vault for the apparent purpose of a photo array. Second, on April 15, 1987 counsel discovered a manila folder containing photos of Victor Forni which a Detective Michael D'Andrea suggested had been shown to a "truck driver" during the Landano investigation. It is on the basis of this circumstantial evidence that the court infers that Portas may have seen and identified a photo of Forni prior to his selection of the Landano photo.

[6] Upon the suggestion of Neil Mullin, counsel for the petitioner, the court had also seen fit to call Mr. Frank Xavier,

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Having had an independent opportunity to observe Portas' demeanor on the stand and to assess his credibility as a witness, this court is convinced that Raymond Portas is a credible witness and further, that his recantation testimony is believable. The court was struck by Mr. Portas' sincerity and candor. His testimony reflects a persistent effort to carefully recall, to the best of his ability, the events of 1976 and 1977 and a similar willingness to honestly admit those facts he was unable to remember. Moreover, Mr. Portas' consistently testified that his uncertainty regarding the identification of petitioner was not the product of fading memory but rather had plagued him at the time of the trial itself. Portas reconfirmed his earlier recantation testimony that he had considered bringing his concerns to the judge's attention even before leaving the courthouse on April 28, 1977, but that he had

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formerly employed as a detective by the Hudson County Prosecutor's office as a possible witness. Ex-detective Xavier had been responsible for supervising Portas' photo identification on April 15, 1977, the date here in question. It was this court's impression that Mr. Xavier might be able to expand upon testimony offered by Mr. Portas. However, on the morning of September 2, 1987 Mr. Xavier communicated to the court that he was unable to appear as he was severely understaffed and could not leave his retail business unattended. The court, finding that Mr. Xavier had established adequate cause pursuant to Federal Rule of Civil Procedure 45(f), excused his appearance that day. Upon the conclusion of Mr. Portas' testimony the court inquired of counsel whether they desired Mr. Xavier's appearance. Both defense counsel and counsel for the state declined the opportunity to call Mr. Xavier to the stand. In light of this wavier, Mr. Xavier was excused from any obligation to appear.

chosen the counsel of a priest instead whose advice had assuaged Portas' fears. Such contemporaneous misgivings enhance the credibility of Portas' testimony. Similarly the fact that two photos from the S-2 array of dark-haired perpetrators were missing at trial and that no adequate explanation has been offered for their disappearance, further strengthens this court's finding as to Portas' believability.[7]

As a result of the September 2, 1987 hearing, this court finds the following facts: (1) Portas is unable to recall at this late date whether or not he was ever shown a photgraph [sic] of Victor Forni, or whether he ever had occasion to see Victor Forni in person;

(2) Portas' in-court indentification [sic] of the petitioner was tainted by the suggestive comments made to Portas

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[7] The state has attempted to provide the court with an explanation for these missing photographs. The state suggests that the missing photographs from the S-2 array were accidentally misfiled in the S-1 photo array. The state explains that the numerical markers on the top right hand corner of the S-2 array appear on the misfiled S-1 photos and that the numbers correspond to those missing from the S-2 folder.

The court finds this explanation implausible because even according to the state's own version, Raymond Portas was only shown the S-5 and S-2 photo arrays such that the prosecutor on April 15, 1977 could not have accidentally placed the S-2 photos in the S-1 folder. Second, the S-1 array was available to the state at trial and in fact, was presented to various witnesses but no error in numbering or sequence was detected at that time. It is on the basis of these facts that the court concludes that no adequate explanation has been offered for the disappearance of the S-2 photos.

in the bathroom immediately prior to his trial appearance.

(a) This court finds it reasonable to infer from Portas' testimony that the individual who approached Portas in the bathroom was a detective or other state agent. Only the state retained a substantial interest in securing Portas' identification. It is unlikely that any stranger to the case would have made such a statement.

(b) Further the court finds that the bathroom statement was "impermissibly suggestive" so as to create a "very substantial likelihood of irreparable misidentification". *See United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985). Portas testified before this court that on April 28, 1977, only thirteen days after having been shown a photo of the petitioner and informed by the state that he was "our man", he was unable to recognize Landano as Landano passed him in the hallway. In addition, Portas testified that subsequent to the bathroom instruction identifying Landano as one of the two men, he was still unable to distinguish between Landano and defense counsel upon entry into the courtroom, and in fact, was only able to identify Landano as the defendant after his counsel introduced himself as such.

In light of this testimony, the court finds that on April 28, 1977, Raymond Portas lacked any "independent recollection" of the petitioner as the man he had seen driving the vehicle on August 13, 1976. *See United States v. Crews*, 445 U.S. 463 (1980).

(3) Finally, the court finds Portas' April 15, 1977 pre-trial identification of Landano to be suspect. In attempting to identify the dark-haired perpetrator from the

S-2 photo array on April 15, 1977, Portas insists that he initially identified an individual other than the petitioner whose photo was then removed, and not reproduced by the state at trial. This information, denied by Detective Xavier, *see* Transcript of October 28, 1982 Hearing at 131, 143-44, was not available to the defense at trial and never presented to the jury. Finding Portas to be "credible" in his assertion, and finding that Portas' recital is corroborated by such circumstances as the unexplained missing photos from the S-2 array, and the suggestion by Hudson County Investigator Michael D'Andrea on April 4, 1987 that a manila folder containing Forni's photo had been shown to a "truck driver" during the Landano investigation but never produced at trial, this court is compelled to doubt the validity of Portas' pre-trial identification of the petitioner. *See* Certification of Neil Mullin, dated May 12, 1987; and Certification of Michael D'Andrea, dated June 1, 1987.[8]

In deciding which of two conflicting versions in this type of proceeding are credible, the court, whether it be the state or federal, may be usurping the function of the jury. If this conflict had been presented to the jury at the

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[8] In his Certification of June 1, 1987, Mr. D'Andrea attempts to retract his original oral representation to petitioner's counsel that a manila folder containing photographs of Victor Forni was shown to a "truck driver" in connection with the Landano investigation. The court finds Mr. D'Andrea's effort to undermine the significance of his suggestion both implausible and inadequate to detract from the credibility of his spontaneous utterance. The court therefore rejects Mr. D'Andrea's post hoc efforts to deny previous representations that Portas had viewed the Forni photographs.

time of trial, the jury would have made the credibility judgment that has been made here. The test should not be which version the court believes, but whether the proferred testimony is sufficiently credible and reliable so that a reasonable jury might accept it as the truth. The fact that two judges have heard the same evidence and reached different conclusions as to its credibility indicates that a jury might well do the same.

However, having held its own evidentiary hearing and having had an opportunity to conduct independent fact finding, this court must now confront the difficult question of what legal significance it may attach to *its* findings. The mere fact that a district court exercises its discretion to conduct an independent hearing does not remove the statutory constraints upon the court's ability to rely on those findings absent adequate legal justification to reject existing, conflicting state court findings.

Section 28 U.S.C. § 2254(d) establishes a presumption of correctness for a "determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an agent or officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia . . . ". In this instance the factual finding at issue is the state court's finding that Portas' recantation testimony was incredible and "untrustworthy". Determinations of credibility by a state court qualify as the type of "factual issue" to which the presumption of correctness generally attachs [sic]. "Issues of fact", as used in 28 U.S.C. § 2254(d), are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the

credibility of their narrators' ". *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506 (1953)).

Being required to extend the state court's credibility finding a "high measure of deference", *Sumner v Mata*, 449 U.S. 539 (1981), this court is necessarily precluded from substituting its own finding of Portas' credibility for the contrary finding reached by the state court. As the collateral facts relevant to petitioner's due process claim – whether or not Portas was able to identify petitioner's photo on April 15, 1977 and whether or not he had an independent recollection of the petitioner at the time of the in-court identification – require a threshold finding that Portas' recantation is credible, this court may not reach the merits of these issues unless it can overcome the presumption of correctness afforded the state court's credibility determination. In other words, petitioner's constitutional claim rests upon a determination that Portas identified someone other than Landano on April 15, 1977 and that this information was suppressed by the state, as was information concerning the bathroom coaching. The prerequisite to rendering such a determination is a belief in the credibility of Portas' October 1982 testimony. If Portas' testimony as to these events is not credible, then there is no factual basis to support the constitutional claim. Therefore, if bound by the state court's credibility finding, this court lacks the authority to reach the constitutional issues framed in petitioner's application.[9]

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[9] In petitioner's Sur Reply Brief, he argues that "[n]o state court has ever made findings or conclusions of law concerning

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The case law makes clear that a federal court in a habeas corpus proceeding may overcome the presumption of correctness only if one of the enumerated exceptions is applicable. *See* 28 U.S.C. § 2254(d)(1)-(8). Upon exhaustive consideration, this court is compelled to conclude that none of the deficiencies enumerated provides cause to set aside the state court's file. (1) The state court did resolve the issue of whether Portas' testimony was believable as required under the standard for evaluating recantation testimony. (2) The factfinding procedure employed by the state court, though perhaps too lenient in permitting the prosecutor's abrasive treatment of the witness, was "adequate to afford a full and fair hearing". (3) A review of the proceeding reveals that Portas' was able to fully develop his tesimony [sic] with the assistance of

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the constitutional implications of the prosecutorial coaching that Raymond Portas received in the course of his photographic and in-court identification of the petitioner". Sur Reply Brief on Behalf of Petitioner at 8. It is beyond dispute that neither Judge Hanrahan nor the reviewing state apellate [sic] court reached the merits of petitioner's constitutional claims. However, this does not lead to the conclusion that this court is free, as a matter of law, to now resolve these constitutional questions.

The state court never reached the merits of these claims because it determined as a threshold factual matter that Portas' recantation testimony was "untrustworthy" and incredible. Such a finding obviated the need to conduct further legal analysis by eseentially [sic] dismissing the factual basis upon which the constitutional claims were predicated. For this reason, if bound by the state court's credibility finding, this court is similarly precluded from reaching the merits of petitioner's claim with respect to Portas' identification testimony.

petitioner's counsel and that the state court had all the relevant information concerning Portas' recantation before it at the time it rendered its decision. Moreover, the court had the opportunity to observe Mr. Portas on two separate occasions providing adequate basis for a credibility determination. (4) The court properly exercised jurisdiction over petitioner's post-conviction application for a new trial. (5) Petitioner's rights were adequately protected by the presence of his counsel who was free to conduct the direct examination of Mr. Portas, as well as proffer objections where appropriate. (6) Again, despite the court's own misgivings concerning the state's treatment of Mr. Portas, the number of times he was reminded that he had previously testified under oath, and the implicit threats of perjury charges, the court cannot conclude that petitioner's application did not receive a full, fair and adequate hearing. The case law illustrates that generally a federal court will set aside a state court finding on this basis only if the state court proceeding suffered form some gross procedural deficiency. *See Moore v. Kemp*, 809 F.2d 702 (11th Cir. 1987); *Davis v. Wyrick*, 766 F.2d 1197 (8th Cir. 1985); *Griffin v. Wainwright*, 760 F.2d 1505 (11th Cir. 1985). Where, as here, the applicant was represented by competent counsel, and was given unrestricted opportunity to examine the witness both on direct and re-direct examination as well as to object to cross-examination, this court would be acting outside the proper scope of the statute if it were to set aside the state court hearing on procedural due process grounds. (7) The applicant was not denied due process as a result of the state court proceeding.

Finally, (8) though this court may reach a different conclusion than did the state court, there is no legal basis for this court to hold that the state court's decision was not "fairly supported by the record". Particularly, where as here, the underlying "fact" is the determination of a witness' credibility, it would be impossible for this court to find, as a matter of law, that the court's subjective impression of the witness' demeanor, sincerity, manner of expression were not "fairly supported by the record". Furthermore, in light of the fact that Portas' testimony was contradicted in the record by that of Detective Xavier who testified that no photo other than petitioner's was selected from the S-2 array, the state court was entitled to weigh these competing recitations and choose between them. Though the opinion does not make this credibility choice explicit, it may be inferred that in disbelieving Portas, the court chose to believe Detective Xavier. Cf *Marshall v. Lonberger*, 459 U.S. 422 (1981).

The statute provides one additional alternative to the district court. 28 U.S.C. § 2254(d) permits a federal court to conduct an evidentiary hearing in a habeas proceeding even absent the existence of one of the enumerated exceptions but requires that "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous". The burden here placed upon petitioner is virtually insurmountable. The only evidence that could be presented to this court is the production of Raymond Portas himself. However, even having heard Portas' testimony and having found him to be credible, this court cannot conclude that the state court's contrary determination was erroneous. As stated previously, it is difficult to imagine the

grounds upon which a credibility determination can ever be considered "erroneous". The subjective judgment implicated in a credibility determination is practically immune from the traditional "error" analysis. "Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous". *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Moreover, the fact that a federal court would rule differently on the question of a witness' credibility is not sufficient to render the state court finding "erroneous". The Supreme Court has ruled that the high measure of deference that must be accorded adequately supported state court factual findings "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations". *Marshall v. Lonberger*, 459 U.S. at 432.

Similarly, in the context of Federal Rule of Civil Procedure 52(a), the Supreme Court has held that a federal appellate court, reviewing the findings of a district court pursuant to a "clearly erroneous" standard of review, is not entitled to "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently". *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). "A reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court". *Id.* In interpreting the congressional intent underlying 28 U.S.C. § 2254, the Supreme Court has explained "[w]e greatly doubt that Congress . . . intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself". *Marshall v. Lonberger*, 459 U.S. at 435.

Doctrines of comity and federalism constrain this court's ability to set aside the state court's finding. This court recognizes that 28 U.S.C. §2254 does not permit a federal court to simply circumvent the presumption of correctness by holding an independent hearing and duplicating the state court's proceeding. To tolerate such judicial manipulation would make a mockery of the legislative policy underlying 28 U.S.C. § 2254. Although this court concluded that there was an appropriate basis to conduct a hearing for the reasons expressed above, judicial restraint requires this court to accord deference to the state court's findings.

Where the recantation testimony of a critical prosecution witness, if believed, raises substantial issues of constitutional import, requiring a federal court to be bound by the state court judge's credibility determination in every instance may undermine the petitioner's right to meaningful habeas review. The presumption of correctness embodied in Title 28 U.S.C. §2254(d) operates to insulate a state court judge's credibility finding from subsequent federal analysis. Where, as here, the petitioner's most significant constitutional allegations are based on Portas' recantation testimony, the federal court should be able to conduct an independent hearing and substitute its credibility finding for that of the state court when the particular circumstances warrant. These circumstances are rare and will not result in gross deviations from the traditions of comity since such independent hearings would only be permitted where the federal court determined that the witness in question played a critical role in securing petitioner's conviction.

The recantation of cumulative evidence, where, for example, one of several eyewitnesses recants his or her identification, would not warrant an independent federal hearing. Further, a federal hearing would only be necessary where the recantation testimony, if believed, raises substantial questions of constitutional import.

Based on this court's independent hearing, if permitted to rely on its own finding of Portas' credibility the court would apply the federal standard for evaluating recantation testimony. In federal court, the impact of recanted testimony as a basis for a new trial motion depends both upon the credibility of the recanting witness and the materiality of his testimony. *See Mastrian v. McManus*, 554 F.2d 813, 823 (1977). This court finds Portas credible. Further the court finds that Portas' in-court identification should have been excluded on the grounds that the detective's coaching was unduly suggestive and infected Portas' ability to give accurate identification testimony; and that Portas had no independent basis for the in-court identification. In addition, if the jury was made aware that Portas had not been able to identify Landano's photo from the array of dark-haired perpetrators, this court is convinced that "the recanted testimony would probably produce an acquittal on retrial". *Id.* at 823.

It is for these reasons that the court believes an injustice results in requiring this court to abdicate its own fact finding authority and turn a deaf ear to petitioner's constitutional claims in deference to the state court's finding that Portas is an incredible witness. Yet, as a district court, this court is sworn to abide by the dictates of existing law and may not deliberately bypass explicit Congressional intent in substituting its judgment for that

of the state court. It is for this reason though that the court urges the federal appellate court to reconsider the application of 28 U.S.C. §2254 in similar circumstances. This court has made every effort to elucidate upon the course it would have followed, if it were free to render its own fact finding. However, the ultimate authority to create a limited judicial exception to the application of §2254 rests, if at all, with the court of appeals and not with this court.

For the reasons stated above, this court is compelled to deny petitioner's application for a writ of habeas corpus on this ground.

II. Allen Roller

As a further ground for relief, petitioner alleges that the state violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing exculpatory and material evidence that would have impeached Alan Roller, the state's principal witness against the petitioner.

In *Brady v. Maryland*, the Supreme Court held that a defendant's due process right to a fair trial is violated when the prosecution withholds evidence that is both favorable to the accused and "material either to guilt or punishment". 373 U.S. 83, 87 (1963). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Thus, under *Brady*, a prosecutor is required to disclose only that evidence favorable to the

accused which, if suppressed, would deprive the defendant of a fair trial. *Carter v. Rafferty*, No. 85-5735, slip. op. at 12 (3d Cir. August 21, 1987). "[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." *United States v. Agurs*, 427 U.S. 97, 108 (1976).

The *Brady* rule has been extended to include impeachment evidence as well as exculpatory evidence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). "Such evidence is 'evidence favorable to an accused' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959)("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying that a defendant's life or liberty may depend").

At trial, Allan [sic] Roller, provided the state's principal evidence against the petitioner. Roller, an indicted co-defendant, admitted his participation in the crime and alleged that Landano had been his partner. *See* Trial Transcript for May 2, 1977, at 15. Further, Roller testified that Landano had admitted to having murdered Officer Snow.

Roller testified at trial pursuant to a plea agreement entered into with the Hudson County Prosecutor's office. When questioned at trial concerning the terms of the plea agreement, Roller disclosed only that he had pled *non vult* to the charge of homicide and felony murder of

Officer Snow in exchange for dismissal of all other counts of the indictment and promised maximum sentence not to exceed thirty years. *See* Trial Transcript for May 2, 1977 at 91. Roller also stated that the Prosecutor had agreed to dismiss "another indictment, another charge of armed robbery" pending against him involving "Mike's Bar" in Jersey City. May 2, 1977 Transcript, at 91-92.[10] Roller alluded to no other pending charge.

In addition, Roller testified as to his criminal association with Victor Forni. Roller admitted that Forni had been involved in planning the Kearney robbery, and in fact, that Forni's gun had been used to kill Officer Snow. However, Roller denied that Forni played any role in the robbery itself. Similarly, Roller denied that he participated with Forni in other crimes.

Subsequent to the trial, evidence was disclosed implicating Allen Roller in armed robberies of the Perth Amboy Coin Exchange on September 26, 1975 and January 23, 1976 prior to trial. This evidence was made the subject of a new trial motion and remanded to the trial court for consideration. Hearings were held upon remand, and the state court rendered the following findings: (1) On August 27, 1976, a witness to the Perth Amboy crimes, Mr.

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[10] When cross-examined as to the details of the "Mike's Bar" incident, Roller initially admitted that there were "three holdup men in that crime", but when asked to disclose the identities of his two co-defendants Roller refused to reveal one of their identities. *See* Trial Transcript of May 4, 1977, at 16-17. When charged by the court to respond to the question, Roller changed his testimony and maintained that only two men had been involved in the Jersey City holdup. The jury was able to infer that Roller was protecting someone.

Stepniak, was presented with photographs of suspects. Stepniak tentatively indentified [sic] Roller, Forni and Reen as the probable perpetrators of the first robbery, but he expressed some uncertainty. Detective Manuel Cruz also identified Allan Roller as one of the persons he observed outside the coin shop immediately prior to the first robbery.

(2) Detective Cruz contacted the Hudson County Prosecutor's office to arrange a line-up for witness Stepniak. As the result of ongoing extradition proceedings against Forni and Reen, a line up was postponded [sic] indefinitely. However, Detective Cruz recalls that Lieutenant Farley of the Hudson County Office, responsible for overseeing the Kearny [sic] investigation, requested that Cruz not publicize the Perth Amboy investigation "in order not to jeopardize any potential plea bargain". December 1, 1978 Opinion of Judge Walsh, Appendix, Volume I, at 33A.

(3) Though Thomas Mulcahy, the assistant prosecutor presenting the state's case against Landano, denied having any knowledge of the Perth Amboy investigation, the state court found that Lieutenant Farley's knowledge could be imputed to the prosecutor. *See Giglio v. United States*, 405 U.S. 150 (1972).

Reviewing these facts, the state court determined that the information concerning Roller's participation in the Perth Amboy robberies was properly "exculpatory" evidence within the meaning of *Brady*. Walsh Opinion at 36A. Specifically, the court held that the suppressed evidence, if allowed at trial "would have been probative in demonstrating, if Roller denied Forni's participation in

Perth Amboy, that Roller was protecting Forni". *Id.* Further, the state court found that the evidence would serve to impeach Roller "by tending to show Roller's interest in testifying favorably in order to minimize the potential consequences of a prosecution for these crimes". *Id.* at 37A.

Having made these findings however, the state court concluded that the withheld evidence was not "material", namely that there was not a reasonable probability that had the suppressed evidence been disclosed, the outcome of the trial would have been different. The Third Circuit has recently ruled that "the materiality of evidence under *Brady* is a mixed question of law and fact and that state court determinations of the law portions of this mixture are not entitled to a presumption of correctness under Section 2254(d)". *Carter v. Rafferty*, No. 85-5735, slip. op. at 16 (3d Cir. August 21, 1987). Accordingly, this court need not defer to the state court's legal conclusion that the suppressed evidence is not material but rather must undertake an independent legal analysis.

In order to determine the "materiality" of this evidence the court must consider "the strength or fragility of the state's case against [Landano] as a whole". *Id.* at 20. As noted by the Supreme Court in *United States v. Agurs*, "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of minor importance might be sufficient . . . " 427 U.S. 97, 112-13 (1976).

At the outset, the court notes that had the suppressed information merely provided evidence of Roller's additional criminal activities, such evidence alone would not be sufficient to undermine confidence in the outcome of the trial. First, Roller's criminal record was already disclosed to the jury such that evidence of additional criminal activity would not serve to seriously impugn Roller's testimony. Second, while evidence that Roller had lied as to the extent of his criminal activities would certainly impeach Roller's credibility, such cumulative evidence standing alone would not suggest a motive for Roller's identification of Landano, nor would it establish additional bias or interest on Roller's part. Roller's interest in testifying favorably was previously established in the record through testimony regarding his guilty plea agreement.

However, the information establishing a criminal partnership between Roller and Forni, evidenced by their joint participation in the Perth Amboy robberies, gives the court greater pause. Though recognizing that the only evidence linking Forni to the Perth Amboy crime was Stepniak's tentative photo identification, the court believes that had defense counsel had the opportunity to present the jury with such evidence, counsel might have convinced the jury that Roller and Forni operated as a team.

The Perth Amboy robbery was similar in kind to the Kearny [sic] robbery. Evidence that Forni and Roller were partners in this criminal venture would have permitted counsel an opportunity to effectively argue that they were partners in the Kearney incident as well. It is undisputed that the gun used to kill Officer Snow was Forni's

and that Forni was involved in the planning stage of the Kearny [sic] robbery. Moreover, the description of the dark haired perpetrator offered by eyewitnees [sic] Joseph Pasciutti closely matched Forni's physical appearance.

At trial Roller denied having participated in criminal activity with Forni. Presentation of the Perth Amboy evidence would challenge Roller's credibility on this issue and create a powerful suggestion that Roller was lying to protect Forni.

If this additional evidence were considered absent Raymond Portas' independent identification of Landano as the driver of the getaway car, the court would unhesitatingly find that the information concerning the Perth Amboy robberies was material. However, considering the additional information in light of Porta's photographic and in-court identification of the petitioner, the court cannot conclude that there is a reasonable probability that the outcome would have been different. In light of the other evidence, this court is compelled to conclude that petitioner was not denied a fair trial as a result of the state's suppression of the evidence concerning the Perth Amboy robberies.

III. The Investigation of Jacob Roth

As a further basis for relief, petitioner asserts that the state of New Jersey violated the requirements of *Brady v. Maryland*, by failing to disclose information concerning an investigation into the potential "loan sharking" and money laundering activities of the Roth check cashing

facility, its suspected connections to "underworld" figures and the possibility of illegal payment of gratuities to the decedent, Officer John Snow. Petitioner argues that such information might have been used to impeach Jacob Roth's testimony by showing bias or interest. *See* Petitioner's Brief at 45.

On July 21, 1981, assistant prosecutor Thomas Mulcahy, responsible for having presented the state's case against petitioner four years earlier, addressed an audience at Kean College on the topic of the Landano trial. *See* Transcript of Mulcahy Lecture, Exhibit A attached to May 27, 1986 Mullin Affidavit. His remarks revealed for the first time that during the pendency of the criminal investigation resulting in petitioner's indictment and trial, a simultaneous investigation was being conducted into the business dealings of Jacob Roth, victim of the Kearny [sic] robbery, and one of two witnesses who positively idenified [sic] petitioner as the dark-haired perpetrator. Mr. Mulcahy's presentation disclosed that the Hudson County Prosecutor's Office had "looked hard" into the Roth check cashing operation suspecting that "these kinds of check cashing operations many times have contacts with the underworld in a sense that they are very convenient since there is so much money being transferred – it's a very convenient place to have a loan sharking operation of . . . a sort. *See* Exhibit A at 233a. Particular suspicion had been aroused with regard to the Roth facility because Roth "also happened to have a place in Elizabeth that he had sold", which Mulcahy believed was a joint venture affiliating Roth with a notorious Bayonne "loan shark" identified as Gallagher. *See* Exhibit

A at 233a; *see also* Israel Affidavit, ¶ 12 attached to Petition as Exhibit C; *see generally* Lotwis Affidavit, attached to Petition as Exhibit D.

Mulcahy's remarks fairly supported an inference that Roth was aware of the ongoing investigation into his business dealings. Mulcahy explained that Roth was subjected to "numerous interviews" throughout the investigation, Exhbit [sic] A at 235a, and that these interviews probed not only Roth's "underworld" connections but also possible improprieties in his relationship with the murdered officer, John Snow. Specifically Mulcahy recalled that "throughout the investigation and in numerous interviews, we [the Hudson County Prosecutor's Office] asked Mr. Roth whether he ever gave any moneys as a gratuity to Mr. – Police Officer Snow who was killed. . . .They never admitted to us that there was ever any monies exchanged, although I always suspected there was". Exhibit A at 235a.

Perhaps most significantly, Mulcahy disclosed for the first time during this presentation that Jacob Roth "was a somewhat uncooperative guy who never wanted to be – didn't want to be bothered – Exhibit a at 288a. According to Mulcahy, Roth "just didn't want to be involved and we had to like coerce him – tell him – you're involved – this is your place – it got ripped off." *Id.*

The significance of Mulcahy's post-trial disclosure may best be understood in context. At trial, Jacob Roth, victim of the Kearny [sic] robbery took the stand and offered testimony against the petitioner. Though Roth's recollection of the events contradicted those of Roller and

of his son Jonathan Roth, Jacob Roth testified that petitioner and not Roller had approached the check cashing facility on the day of the crime. Roth rendered an in-court identification of petitioner and testified that prior to his court appearance he had twice "positively" identified petitioner's photo when shown a photographic array. Contrary to Roth's testimony, Detectives Zarnowski, Thompson and Hanson described Roth's initial photo identification on August 26, 1976 as "tentative", but that Roth had been able to positively idenitfy [sic] the petitioner from photo array S-2 on August 31, 1976. Roth maintained that each of the two identifications had been "positive". *See* Trial Transcript, April 27, 1977, at 21.

When petitioner took the stand at trial the prosecutor inquired of him: "is there any reason you know of that Mr. Roth would have come in here and point you out as the man he saw from his window on August 13?". *See* Trial Transcript, May 10, 1977 at 81-82. Petitioner could offer no explanation.

Finally, the prosecutor's summation emphasized to the jury that "throughout this case there is no suggestion of police malpractice or coercion on these [photographic] selections." *See* Trial Transcript, May 11, 1977, at 95-96.

Petitioner now comes before this court arguing that the information concerning the state's investigation of Roth, previously suppressed, is both exculpatory and material under the rule in *Brady* and provides a sufficient basis for vacating petitioner's conviction. Petitioner argues that the mere fact of the investigation is sufficient to establish bias and therefore qualifies as exculpatory evidence. Relying on the court's reasoning in *State v. Mazur*,

158 N.J. Super. 89 (App. Div. 1978), *cert. den.* 78 N.J. 399 (1978), petitioner asserts that even though no formal charges were pressed against Roth, the investigation's coercive effect was substantial in light of a New Jersey statute which provides that the state may refuse to renew a check cashier's license if he is "associating or consorting with any person who had, or persons who have, been convicted of a crime or crimes in any jurisdiction". *N.J.S.A.* 17:15A-12. Arguing that the investigation was "livelihood threatening" and had a bearing on Roth's future licensing, petitioner urges this court to conclude that had the jury known of the investigation they could have inferred that Roth had an interest in accomodating [sic] the prosecution and further could have ascribed a motive to Roth's willingness to mischaracterize his tentative identification of Landano as "positive".

This court is inclined to agree that the information concerning Mulcahy's investigation into Roth's business dealings is exculpatory and if used effectively might have so undermined the jury's assessment of Roth's credibility as to alter their deliberative consideration of his identification testimony. Though the contradictions between Roth's testimony and that of other witnesses were readily apparent to the jury at trial, disclosure of this information would have provided the jury with a possible explanation for Roth's deviation. The court finds the state's contention that counsel for petitioner was free to cross-examine Roth "on any subject, including any possible organized crime connections to his check cashing operation" both insincere and implausible. *See* State's Brief in Opposition at 23. The state's knowing suppression of its investigation cannot be excused by asserting that counsel for petitioner

might have been able to "fish" out some possible interest or bias on Roth's part through cross-examination.

Moreover, the court rejects the state's argument that Mulcahy's July 1981 comments are not a proper basis for establishing the existence of a contemporaneous investigation of Roth's business dealings. The court finds no basis in law or reason to support the state suggestion that petitioner bears the burden for providing affidavits from Mulcahy and Roth to substantiate the veracity of Mulcahy's comments. *See* State's Reply Brief at 5. On the contrary, petitioner is entitled to rely on information provided by the state prosecutor and the burden falls to the state to convince the court that these comments are not accurate. Finding that the state has made no effort to submit an affidavit by Mr. Mulcahy denying the details of the Roth investigation the court finds that the state impliedly admits the authenticity and veracity of the Mulcahy comments.

What remains however is for this court to determine whether evidence regarding the Roth investigation satisfies the *Brady* materiality standard. In rendering its decision the court must take into account that Roth was the only state witness present at the crime scene who was able to "positively" identify Landano. In addition, the court recognizes that the jury struggled with this action and in fact, appeared deadlocked after two days of deliberation.

Yet, upon review of the record, this court is compelled to conclude that even were the jury to discredit Roth's testimony in its entirety, there is no reasonable probability that the outcome of the trial would have been

different. The court bases its decision on the following factors: The strongest evidence presented against the petitioner at trial was the testimony of co-defendant Allen Roller. Roller's trial testimony contradicted Roth's testimony with respect to petitioner's role in the commission of the crime. As Roller's testimony was confirmed both by the description of eyewitness Pasciutti, who testified that the dark-haired perpetrator did not approach the check cashing facility but rather approached Officer Snow's vehicle, and by the testimony of Raymond Portas who was able to affirmatively identify petitioner as the driver of the getaway car, the court must conclude that the jury was persuaded by this testimony and relied on it in reaching their verdict of conviction. The subtraction of Roth's testimony does not detract from the weight of this evidence. It is for this reason that the court concludes that exclusion of this evidence would not create a sufficient probability of acquittal.

IV. The Allen Charge

As the final ground for relief petitioner alleges that the trial court improperly interfered with the jury's prerogative to return no verdict by issuing a "coercive" *Allen* charge in violation of petitioner's Sixth Amendment and due process rights.

In *Allen v United States*, 164 U.S. 492 (1896), the Supreme Court sanctioned use of a supplemental jury charge instructing a deadlocked jury to resume deliberations with "a proper regard and deference to the opinions of each other" and to "listen, with a disposition to be

convinced to each other's arguments", and thus "to decide the case if they could conscientiously do so" *Id.* at 711. While the Supreme Court's holding in *Allen* remains the controlling law, use of the *Allen* charge has been severely criticized.

In 1980, the New Jersey Supreme Court in *State v. Czachor*, 82 N.J. 392, exercised its supervisory power to hold that use of "a charge containing coercive features should not be given to a jury in the trial of a criminal case." 82 N.J. at 402. The court reasoned that the "*Allen* charge conveys both blunt and subtle pressure upon the jury, pressure which is inconsistent with jury freedom and responsibility". *Id. Czachor* was given limited retroactive effect, and the Appellate Division upon review of petitioner's post-conviction relief application determined that petitioner's action was properly within the scope of *Czachor*'s limited retroactivity. *See* opinion of the Appellate Division, January 30, 1984, Appendix, Volume I at 240A.

However, the *Czachor* court made clear that "[t]here will undoubtedly be some appeals coming within the rule of limited retroactivity in which all or the most objectionable characteristics of the typical *Allen* charge will not be present. In such instances, it would be appropriate for the appellate court to review the surrounding circumstances in order to decide whether there was sufficient potential for coercion to justify reversal". 82 N.J. at 410.

The Third Circuit in *United States v. Fioravanti*, 412 F. 2d 407 (3d Cir. 1969) *cert denied* 396 U.S. 837 (1969), provides the appropriate standard. *Fioravanti*, like *Czachor*, condemned the *Allen* charge as an unwarranted

judicial invasion of the exclusive province of the jury. The court reasoned that "[t]he possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. And although dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict". *Id.* at 416. Further, *Fioravanti* challenged the premises upon which the *Allen* charge is based, namely (1) that the minority should reexamine their own convictions in light of the majority's viewpoint and (2) that individual jurors should sacrifice their reasonable doubts in order to achieve unanimity.

While in *Fioravanti*, the Third Circuit exercised its supervisory power to preclude use of the *Allen* charge within this circuit, the court's ruling cannot render use of an *Allen* charge by a state court presumptively unconstitutional. *Id.* at 419-20. However, pursuant to *Fioravanti*, a petitioner must demonstrate that the *Allen* charge and the context in which it was presented was so prejudicial as to deprive the petitioner of a fair trial and a unanimous verdict based on proof beyond a reasonable doubt. *Id.* at 419. Applying this standard to the facts at hand, this court cannot conclude that the charge given was unduly coercive and therefore denies relief on this basis.

After approximately two days of deliberation and an intervening week-end, the jury informed the court as follows:

> "Your honor, we honestly feel we cannot get a twelve vote count on guilty or not guilty. We

> tried on all eight counts. We can't say twelve to zero guilty or not guilty. What shall we do?"

The court responded by delivering an *Allen* charge, instructing the jurors to resume their deliberations. The full text of the court's instruction appears at pages 2 thorugh [sic] 4 of the Trial Transcript from May 17, 1977. Petitioner objects to the following portions of the instructions:

(1) the judge emphasized the time and expense involved in trying petitioner remarking " . . . we are in the fifth week of this trial. And I think you realize what is invested as far as time, money and everything else."

(2) the judge instructed the court that "this case at a future time must be decided" and that "[t]here's no reason to suppose that the case will ever to submitted to twelve persons more intelligent, more impartial or more competent to decide it; or that more or clearer evidence will ever be produced on one side or the other".

While the court agrees that it was unecessary [sic], and in fact, inaccurate to instruct the jury that this case "must be decided", when considered in context, this court cannot find that the instruction was so coercive as to have deprived petitioner of a fair trial and the right to a unanimous jury.

In the course of its instruction, the trial court made clear to the jurors that they had "a duty to reach a verdict", but then immediately added "if that's possible". The court was careful to explain that it had "neither the power nor the desire to compel an agreement upon a

verdict". In asking the jurors to resume their deliberations, the court emphasized "the importance and desirability of reaching a verdict, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions".

Read as a whole, the instruction is a forceful effort to encourage further deliberation. Nevertheless, it does not request the minority to succumb to the majority viewpoint, nor does it ask that individual uncertainty be sacrificed to achieve unanimity. In fact, the trial judge was careful to remind the jurors that it would, and could not compel a verdict and that no individual should surrender his or her own scruples. By admitting that it lacked the power to compel an agreement upon a verdict, the court conveyed to the jury a definite impression that it was *not* demanding a verdict.

Other courts have ruled that an instruction informing a jury that a case "must be decided" violated the Sixth Amendment by denying the jury's preprogative [sic] to return no verdict. However, in this case, the offending charge that this case must be decided followed a thorough and careful explanation by the court that it might not be possible to reach a verdict, that the court lacked the power to compel a verdict and that no individual juror was required to sacrifice his or her beliefs in order to reach agreement. Considered in this context, the language was not sufficiently forceful to "coerce" the verdict, nor did it mislead the jury into believing that they could not return no verdict. As the questionable language was tempered by an appropriate, albeit forceful invitation to undertake further diligent deliberative efforts, the

court finds that the trial court did not violate petitioner's Sixth Amendment right in delivering this instruction.

CONCLUSION

The failure to grant the writ predicated upon the Portas recantation infects the remaining grounds as well. The conviction would clearly fall but for the resurrection of Portas' trial identification testimony. Without it, even the other grounds would provide independent bases for relief and certainly in the aggregate, they would be sufficient to undermine confidence in the trial's outcome.

No decision of this court has ever been made with greater reluctance. In the current debate over judicial restrain and judicial activism, one tends to forget that individuals as well as concepts and principles are involved. Upholding deference to state factual findings in this matter is a bitter exercise of judicial restraint, since it may result in a gross injustice.

The writ is denied. There is probable and significant cause to appeal.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: September 29, 1987

Original to Clerk, U.S. District Court

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(2)

No. 89-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VINCENT JAMES LANDANO,

Petitioner,

v.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, and IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rule of comity which serves as the basis for the exhaustion doctrine in 28 *U.S.C.* sec. 2254 is violated by a habeas petitioner presenting to the federal district court newly discovered evidence which significantly alters the posture of the case and the claim asserted without giving the state courts the initial opportunity to review and analyze the evidence?

2. Whether a habeas petitioner is entitled to circumvent the exhaustion requirement of 28 *U.S.C.* sec. 2254 by asserting in a *Brady* claim that the prosecutors allegedly acted in bad faith thereby denying state courts the initial opportunity to review claims of constitutional error?

3. Whether a supplemental jury charge delivered after a short period of deliberation in a lengthy state court trial, which did not focus on the minority jurors but instead told the jurors that they should not reach a verdict unless they could do so without surrendering or sacrificing their conscientious scruples or personal convictions, was unconstitutionally coercive?

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Petitioner,

v.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, and IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTER-STATEMENT OF THE CASE

The Trial

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearny, New Jersey. (App. 8). During the robbery, one of the perpetrators shot and killed Newark Police Officer John Snow. (App. 8). Hudson County Indictment No. 73-76 charged petitioner Landano and three other men, Allan Roller, Victor Forni and Bruce Reen, with felony murder and other crimes stemming from the robbery. (App. 8). The trial of Forni and Reen was severed

from that of Landano and Roller.[1] Prior to the commencement of the Landano and Roller trial, and pursuant to a plea agreement with the prosecutor, Roller pled *non vult* to the felony murder charge and testified against Landano. (App. 8).

The following evidence was adduced at Landano's trial. In 1976 Allan Roller, the president of the Breed motorcycle gang, and Victor Forni, a non-gang associate of Roller's described as the organizer of gang criminal activity, recruited David Clyburn to carry out armed robberies in the metropolitan area, including a conspiracy to rob the Hi-Way Check Cashing facility located in a trailer on Jacobus Avenue in Kearny, New Jersey. (Ja97, Ja144).[2] Forni planned the crime and supplied the weapons, while Roller and Clyburn were to execute the robbery. (Ja4). Normally, Forni or other Breed members would be stationed near such designated robbery targets to serve as backup. After participating in a dry run, Clyburn decided to withdraw because he was apprehensive about his confederates. (Ja97, Ja144-145). As a replacement, Forni recruited his friend Landano on August 11, 1976, and Roller and Forni showed Landano the target area the following day. (Ja98, Ja145). At about 7:30 a.m. on August 13, 1976, Forni, Roller and Landano set out from Staten Island for South Kearny. (Ja98, Ja145-146). Forni helped steal a car for perpetrating the crime, supplied coffee, and then returned to New York, while Landano and Roller waited for the check

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[1] Forni and Reen were tried for these offenses in 1978 and were convicted of conspiracy to commit armed robbery but acquitted of the murder and other charges.

[2] Ja refers to the Joint Appendix filed in this case with the Court of Appeals for the Third Circuit.

cashing establishment to open. (Ja98, Ja146). At about 9:20 a.m. Roller and Landano approached the trailer; Landano attempted to enter the trailer door, while Roller went to the window, displayed a handgun, and demanded admittance. (Ja146-147).

Seeing Roller brandishing a gun, the proprietor, Jacob Roth, activated the silent alarm and yelled for his son Jonathan and a customer, John DeMaritz, both of whom were inside, to "hit the deck." (Ja147). Landano, meanwhile, had left the trailer area and proceeded to a van parked in the lot and occupied by Colin McCormick, who had just cashed his check and was counting his money. (Ja99, Ja146). Pushing the barrel of his gun into McCormick's side, Landano demanded McCormick's money and, after observing Newark Police Officer John Snow arriving in a marked police car, instructed McCormick[3] to lie on the floor of the van. (Ja146-147).

Roller entered the trailer and secured the cash drawer, which contained $7,000. (Ja147). Almost simultaneously, Landano ran toward the police car, raised the gun over his head, then levelled it and fired. (Ja148). The bullet struck Officer Snow in the neck, severing an artery and precipitating a great loss of blood. Not forgetting his purpose, however, Landano reached into the patrol car and over the dying police officer to secure an attache case which contained $46,000. (Ja148).

Joseph Pascuiti, an employee of an adjacent warehouse, observed a dark-haired man run towards the police car and point a gun at the police officer. (Ja228-

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[3] McCormick described his attacker as a tall, thin man with broad shoulders and dark hair. (Ja146).

230). When Pascuiti turned to summon help, he heard several gunshots. (Ja148, Ja230). He described the gunman as "built-up in the shoulders," with dark curly hair and wearing a colored jacket. (Ja148; Ja229). Pascuiti also testified that the gunman was the driver of the getaway car. (Ja234, Ja240-241).

Landano and Roller reached the stolen getaway car and sped from the lot, where Landano informed Roller that he had to "ice [or waste] the cop." (Ja99). Jacob Roth made note of the license plate number of the getaway car, SRU 329. (Ja101, Ja148). Behind the wheel, Landano drove frantically in an effort to weave through a truck traffic jam.

Raymond Portas, a truck driver caught in the traffic jam through which the getaway vehicle maneuvered, observed the occupants of that vehicle. (Ja101, Ja148). He positively identified Landano as the driver. (Ja101, Ja149). He also noted the license plate number of the car, SRU 329. (Ja101, Ja148).

Landano missed the Skyway entrance and ultimately came to rest at the waterfront. They abandoned the vehicle, discarded their weapons and separated. (Ja99, Ja149). Later that day Landano shaved off his mustache and met Roller and Forni in Staten Island to divide the proceeds. (Ja100).

A blood-stained hat, recovered from the abandoned getaway vehicle, was linked to Landano, who had been photographed wearing such a hat on several occasions. (Ja100, Ja149-150). Strands of hair found in the hat were similar to Landano's hair. (Ja150). Allan Roller was apprehended in Denver and recounted Landano's involvement in the robbery and murder. (Ja98-100). Clyburn was apprehended on an-

other charge and implicated Forni, Roller and Reen. (Ja144-145). Jacob and Jonathan Roth identified Landano as the dark-haired perpetrator (Ja101, Ja147), and Portas identified him as the driver of the getaway car. (Ja101).

Landano's trial lasted approximately 19 days. The jury began its deliberations on Friday, May 13, 1977 at approximately 11:50 a.m. (Trans. 5/13/77, p.86). Soon thereafter, the jury requested that the testimony of three witnesses be reread. (Trans. 5/13/77, p.87). The court was unable to secure the requested testimony at that time and informed the jury that the testimony would be reread on Monday. The jury then went home at approximately 5:00 p.m. (Trans. 5/13/77, pp.90-94).

On Monday, May 16, 1977, the testimony of the requested witnesses was read to the jury. This process consumed the entire morning. (Trans. 5/16/77, pp. 3-6). The jury resumed deliberations at 12:15 p.m. and returned with a request for additional information at 4:25 p.m. (Trans. 5/16/77, p. 6). The jury's question was answered and they went home for the evening. (Trans. 5/16/77, pp. 6-9).

The following morning, at approximately 10:00 a.m., the jury foreman sent the judge a note indicating that the jury was unable to reach a verdict. The trial judge gave the following supplemental instruction to the jury:

> Ladies and gentlemen, we are in the fifth week of this trial. And I think you realize what is invested as far as time, money and everything else.

You have now informed the Court of your inability to reach any verdict in this case. As I've indicated to you several times, the Court does not wish to know, and you're not to indicate in any way how you stand or whether you personally entertain a predominant view. That's your business.

But, at the outset this Court wishes you to know that although you have a duty to reach a verdict, if that's possible, the Court has neither the power nor the desire to compel an agreement upon a verdict.

Now, the purpose of these remarks is to point out to you members of the jury the importance and desirability of reaching a verdict in this case, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. That oath places upon each of you as individuals the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusions of your fellow jurors.

However, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to reach a verdict by a comparison of views and by a consideration of the proofs with your fellow jurors.

> During your deliberations you should be open-minded and consider the issues with proper deference to and respect for the opinions of each other and you should not hesitate to re-examine your own views in the light of such discussions.
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> You should consider also, and I'd like you to pay close attention to this, that this case at a future time must be decided; that you're selected in the same manner and from the same source from which any future jury must be selected. There's no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it; or that more or clearer evidence will ever be produced on one side or the other.
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> Having said that, and saying it forcefully to you, ladies and gentlemen, I ask you to retire once again to the jury room and invest more time in the case as is necessary for further deliberations upon the issues submitted for your determination and see what you come up with, please. Thank you.
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> [Trans. 5/17/77, pp.2-4].

The jury resumed deliberations at 10:17 a.m., and returned with a verdict at 11:10 a.m. (Trans. 5/17/77, p.4). Landano was convicted of felony murder and the other charged offenses.

Petitioner's First Post-Conviction Proceeding (1978).

While petitioner's direct appeal was pending, he filed a motion with the Appellate Division seeking a

remand to the trial court for determination of a motion for a new trial based on newly discovered evidence. A remand was granted and evidentiary hearings were thereafter conducted in the trial court on November 21, 22 and 27, 1978.

Among other things, petitioner maintained that the Hudson County Prosecutor's Office had failed to disclose the fact that Roller was suspect in certain other robberies that had been committed in Perth Amboy. Although the trial prosecutor had apparently been unaware of the fact,[4] Lieutenant Farley of the homicide squad had been contacted in late August 1976 by Perth Amboy authorities seeking to arrange a lineup with Roller, Forni, Reen and gang member William Farullo. At that time, however, Forni and Reen were confined in New York and contesting extradition. The lineup was therefore postponed until all four suspects could be assembled together in New Jersey.

During subsequent discussions, Lieutenant Farley requested the Perth Amboy authorities not to publicize their investigation in order either to prevent alerting the suspects of the need to concoct an alibi [according to Farley] or to aid in plea bargaining negotiations [according to Perth Amboy Detective Manuel Cruz]. When the suspects were still unavailable in mid-November 1976, contacts between the two authorities were suspended. They were not to resume

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[4] The trial prosecutor noted that he had anticipated that Roller would go to trial [Roller did not enter his plea until the day before the trial]; accordingly, the prosecutor would have been anxious to have information tying Roller to another crime purportedly similar to the Hi-Way Checking offense for possible use under *N.J. Evid. R.* 55.

until March 1978. No charges were ever preferred against Roller by Perth Amboy authorities.

On December 1, 1978, Judge Walsh rendered a comprehensive forty-seven page opinion which denied the new trial motion. (Ja94-140). The court reviewed the evidence at trial highlighting the quality of the proofs adduced by the prosecution wholly apart from the testimony of Allan Roller. The court thereupon concluded that the evidence against defendant had been overwhelming and that no verdict other than guilty had been possible. Notwithstanding its view of the proofs, the court carefully considered each of the asserted bases for relief and also whether the cumulative effect of the matters brought to its attention had undermined the essential fairness of petitioner's trial. Upon due consideration, the motion for a new trial was denied in all respects.

Thereafter, on March 21, 1980, the Superior Court of New Jersey, Appellate Division, denied petitioner's consolidated appeals from his conviction and the denial of his new trial motion. (Ja141-157). The Supreme Court of New Jersey denied certification on July 8, 1980. *State v. Landano*, 85 *N.J.* 98, 425 *A.*2d 263 (1980).

Petitioner's Second Post-Conviction Proceeding (1982).

In 1982, petitioner filed a petition for post-conviction relief in the state trial court. Petitioner attempts to demonstrate in his statement of facts before this Court that the claims he is now raising before this Court were raised in his 1982 post-conviction relief proceeding. In this regard petitioner relies upon the "Preliminary Statement" to his brief in support of his motion for post-conviction relief (Ja30-31, Ja397-

399) and the section of his petition for certification to the Supreme Court of New Jersey where he set forth the "Reasons Why Certification Should be Allowed" (Ja31, Ja551) in support of his claim that the grounds he now advances were raised in the state courts. (Pet. at 11-16). However, an examination of Landano's state court pleadings reveals no mention of the specific factual claims later raised in the 1989 habeas proceeding in the district court. Landano simply asserted, in general terms, that the State suppressed evidence that incriminated Forni and allegedly fabricated evidence inculpatory of himself. The fact that it was Landano's general theory that Forni was the actual killer of Officer Snow did not satisfy, for exhaustion purposes, the factual issues he raised for the first time in the district court.

An examination of the pleadings filed by Landano in the state courts clearly demonstrates that his claims with respect to prosecutorial misconduct focused exclusively on the Portas and Roth identifications and the evidence of Roller's other crimes. (Ja397-422; Ja433-443; Ja463-588). Landano's Memorandum In Opposition to the State's Motion to Dismiss the Petition for Post-Conviction Relief indicates that the issues raised as a basis for post-conviction relief were: 1) Portas' recantation; 2) criminal investigation of Jacob Roth; 3) the Mulcahy tape; 4) possible involvement of Officer Snow's son in the crime, and 5) the *Allen*[5] charge issue. (Ja412-421). Judge Hanrahan's letter opinion of July 13, 1982, confirms that these five issues were the only ones raised in the petition. (Ja158-160). The trial court denied relief on the issues

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[5] *Allen v. United States*, 164 *U.S.* 492 (1896).

relating to the Roth identification, the *Allen* charge, the Mulcahy tape, and Officer Snow's son, but granted an evidentiary hearing on the Portas recantation. (Ja158-162).

In a motion dated September 1, 1982, Landano sought to expand the scope of the evidentiary hearing to include the Jacob Roth identification issue. (Ja422-424). Landano also sought discovery of all files and documents containing references to the Portas and Roth identifications, and to take a deposition of Thomas M. Mulcahy. (Ja422-450). In a letter opinion dated September 27, 1982, Judge Hanrahan denied Landano's motion to expand the scope of the evidentiary hearing and for discovery on the Roth and Mulcahy issues. (Ja163). Landano did receive discovery on the Portas issue and subpoenaed several documents from the State which included the Portas statement of April 15, 1977, a supplementary investigation report, dated August 19, 1976, a three page list of exhibits, photographs, and other statements by Portas. (Ja451-462).

The state court conducted several days of evidentiary hearings on the Portas recantation, and petitioner was permitted to fully present testimony relevant to his contention that Portas' identification of him was the product of suggestive prosecutorial procedures. The testimony given by Portas at the hearing was completely contrary to Portas' trial testimony and to the testimony of the state investigator who conducted the photo identification. At this hearing Portas recalled that he testified only once before—at petitioner's trial, despite the fact that Portas actually testified three times—at the pre-trial identification hearing, at petitioner's trial and at the

codefendants' trial. On each of these occasions, Portas identified Landano as the driver of the get-away car. The state trial judge found that Portas' testimony was not credible and that his partial recantation was not believable.

In his brief to the Superior Court of New Jersey, Appellate Division, Landano raised seven issues relating to the post-conviction relief proceedings. (Ja463-521). He raised two issues with respect to prosecutorial misconduct (Points IV and VII), but they focused solely on the statement of a Mr. Kaiser and a general claim of prosecutorial misconduct regarding the Roth and Portas identifications. (Ja463-521). The Appellate Division affirmed the decision of the trial court. Landano raised the same issues in his Petition for Certification to the Supreme Court of New Jersey, which denied certification in this case. (Ja542-569). These are the same issues that Landano raised before the district court and the Third Circuit Court of Appeals in his 1985 habeas proceeding. *Landano v. Rafferty*, 670 *F. Supp.* 570, 573 (D.N.J. 1987), reconsideration denied, 675 *F. Supp.* 204 (D.N.J. 1987), aff'd 856 *F.*2d 569 (3d Cir. 1988), *cert.* den. 109 *S.Ct.* 1127 (1989). Landano never raised in the state courts or in the 1985 habeas proceeding any claims with respect to the Pasapas and Calabrese identifications, or any "negative" identification by Pascuiti. Landano's identification claims in the state courts focused solely on Portas and Roth. The *Brady* claims that petitioner now raises before this Court were presented for the first time in the 1989 habeas action in the district court and were never raised in the state courts.

The court of appeals found that petitioner's preliminary statement to his post-conviction relief brief did not raise the *Brady* claims he later advanced in the district court. (App. 25-29). The court of appeals also examined petitioner's state court pleadings and the legal arguments advanced and determined that the factual bases for the current *Brady* claims were never raised in the state courts and thus were not exhausted. (App. 23-32).

The 1985 Habeas Petition

On October 10, 1985, Landano filed a petition for habeas corpus relief with the United States District Court of New Jersey. Landano raised the following grounds for relief:

> (1) that his due process rights to a fair trial were infringed by the admission of Raymond Portas' identification testimony; (2) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of codefendant Allen Roller; (3) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of Jacob Roth, victim of the armed robbery; and (4) that the state court's coercive charge to the jury violated the petitioner's Sixth Amendment right to an impartial jury.
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> [App. 145, footnote omitted].

The district court held an evidentiary hearing at which Portas alone testified,, although the State was not permitted to question him. The district court made factual findings contrary to those reached by the state court and determined that Portas was a credible wit-

ness. (App. 158-171). The district court recognized, however, that 28 *U.S.C.* sec. 2254(d) established a presumption of correctness for the factual findings of the state court that "Portas' recantation testimony was incredible and 'untrustworthy' " (App. 163), and thus it was bound by those findings. (App. 163-171).

In an opinion dated September 29, 1987, the district court denied habeas corpus relief, *Landano v. Rafferty*, 670 *F.*2d 570 (D.N.J. 1987) (App. 139-189), and on December 22, 1987, Landano's motion for reconsideration was denied. *Landano v Rafferty*, 675 *F. Supp.* 204 (D.N.J. 1987). The Third Circuit affirmed the denial of the habeas petition, *Landano v. Rafferty*, 856 *F.*2d 565 (3d Cir. 1988), and this Court subsequently denied *certiorari* on February 21, 1989. *Landano v. Rafferty*, 109 *S.Ct.* 1127 (1989).

The 1989 Habeas Petition

Subsequent to this Court's denial of *certiorari*, Landano discovered in the file of a codefendant, a Kearny Police Continuation report which he claims he did not receive in discovery. This report contains an identification made by a Joseph Pasapas in which he stated that codefendant Victor Forni resembled the driver of the get-away car. Rather than pursuing this new and unexhausted factual claim in the state courts where it correctly should have been raised, Landano instead obtained an *ex parte* order from the district court seizing all the police and prosecution files in this matter.

Landano's current attorneys, who did not represent him at trial, reviewed the state's files and found several items that they alleged were not given in discovery at the time of his trial. These items included:

1) Kearny Police Continuation Report dated January 19, 1977, prepared by Detective Edward Rose, which states that a Joseph Pasapas picked out a picture of Forni as resembling the man who drove the get-away car; 2) envelope found in the Kearny Police file that had handwritten on it "Forni looks like guy who was driving down street," 3) an undated and unsigned handwritten document with "Id. on Landano" written on top of the page with a list of witnesses and notations next to the names. Landano claimed that this particular document supported an inference that these witnesses were shown a single photograph of him and had eliminated him as the perpetrator of the offense.

The State asserted the exhaustion defense in the district court on the grounds that these particular documents and the specific factual claims raised by Landano were never presented to the state courts. The State disputed that any suppression occurred in this case and presented compelling evidence that the information in the Kearny Police report was known to Landano and was elicited at his trial. The State also argued that the "Id. on Landano" handwritten document did not demonstrate that a single photograph was shown to any witness in this case, nor did it indicate that Landano was eliminated as the perpetrator of this murder. Despite the obvious exhaustion problems and factual disputes, the Honorable H. Lee Sarokin, U.S.D.J., determined that an evidentiary hearing was not warranted and granted the conditional writ of habeas corpus. (App. 76-138).[6]

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[6] Landano quotes at length from the portion of the district court opinion that discussed the alleged bad faith of the prosecution. The State has consistently and strenuously disputed the

The State appealed to the Court of Appeals for the Third Circuit which reversed the judgment of the district court and directed the district court to vacate the order granting the writ of habeas corpus and dismiss Landano's petition. (App. 38). The Third Circuit found that Landano had not exhausted state remedies and noted that "Landano concedes that none of the suppression claims he previously raised in his initial habeas petition specifically included the information he now claims was suppressed, *i.e.*, the information contained in the 'Id. on Landano' document and the Kearny Police Continuation Report." (App. 23). The Third Circuit also recognized that the State's argument on non-suppression "as well as on other issues relating to the merits of Landano's claims, is not insubstantial." (App. 30 n.16).

The Honorable Max Rosenn, U.S.C.J., dissented from the majority opinion. (App. 39-68). On April 3, 1990, Landano's petition for rehearing was denied by the Third Circuit. (App. 69-71).

REASONS FOR DENYING THE WRIT

POINT I

THE THIRD CIRCUIT COURT OF APPEALS APPLIED THE RULE OF EXHAUSTION FORMULATED BY THIS COURT AND THE OTHER CIRCUIT COURTS IN REQUIRING LANDANO TO PRESENT NEWLY DISCOVERED DOCUMENTS WHICH FORMED THE BASIS OF HIS HABEAS CLAIM TO THE STATE COURTS FOR REVIEW.

In an attempt to entice this Court to grant a writ of *certiorari*, Landano asserts that the opinion of the

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claim that the prosecution engaged in a bad faith pattern of suppression in this litigation. (See Point II, *infra*).

Third Circuit Court of Appeals on Landano's need to exhaust in state court his claims, based upon newly discovered evidence, contradicts the holdings of another circuit court, thereby creating a conflict within the federal courts which should be resolved by this Court. This assertion is incorrect. The Third Circuit Court of Appeals in this case applied the rule of exhaustion formulated by this Court and followed by other circuits in requiring Landano to return to state court to present the newly discovered documents which he claimed warranted habeas relief. For that reason, the petition for a writ of *certiorari* should be denied.

When Landano sought to reopen his previous habeas petition under *Fed. R. Civ. Proc.* 60(b), he presented to the district court a Kearny, New Jersey, police department continuation report which he purportedly never had received in discovery in state court and had obtained from the file of a codefendant's attorney. (App. at 15). He also sought and obtained an *ex parte* order to seize files belonging to the Hudson County Prosecutor's Office, the New Jersey Attorney General's Office and several police departments dealing with the case. In the Hudson County Prosecutor's file, Landano retrieved a handwritten sheet of paper labeled "ID. on Landano." (App. at 16-17). The district court found, without holding an evidentiary hearing, that these documents were indeed suppressed by the prosecution and determined that a conditional writ of habeas corpus should be granted. (App. at 17-19). This decision was reversed by the Third Circuit on exhaustion grounds.

As this Court consistently has ruled, a state prisoner must exhaust available state remedies before

seeking redress in the federal courts. *Granberry v. Greer*, 481 *U.S.* 129, 133-134 (1987); *Duckworth v. Serrano*, 454 *U.S.* 1, 3 (1981); *Picard v. Connor*, 404 *U.S.* 270, 275 (1971). This requirement applies even when the relief is sought under *Fed. R. Civ. Proc.* 60(b). *Pitchess v. Davis*, 421 *U.S.* 482, 489 (1975). The doctrine is not jurisdictional but reflects a policy of federal-state comity, *Rose v. Lundy*, 455 *U.S.* 509, 515, 516 (1982), and "serves to minimize friction between our federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of constitutional rights." *Duckworth v. Serrano*, 454 *U.S.* at 3; *Picard v. Connor*, 404 *U.S.* at 275. An exception to the rule is made only if there is no opportunity to obtain redress in state court or if the state corrective process is so deficient as to render any attempt to seek relief in the state court futile. *Duckworth v. Serrano*, 454 *U.S.* at 3; *Wilwording v. Swenson*, 404 *U.S.* 249, 250 (1971).

A petitioner exhausts state remedies by fairly presenting the claim raised in federal court to the highest court in the state. The claim raised in federal court must be the substantial equivalent of that presented to the state court. *Picard v. Connor*, 404 *U.S.* at 275, 278. This requirement requires the petitioner to present the state court with both the factual and legal premise presented in state court. *Gibson v. Scheidemantel*, 805 *F.*2d 135, 138 (3d Cir. 1986). When, as in this case, documents submitted to the federal court were never presented to the state courts and place the case in a significantly different posture than when the state courts initially considered it, the federal courts of appeal uniformly hold that the petitioner

must return to the state court and exhaust state remedies. See, *e.g.*, *Dispensa v. Lynaugh*, 847 *F.*2d 211, 217 (5th Cir. 1988); *Wise v. Warden, Maryland Penitentiary*, 839 *F.*2d 1030, 1033 (4th Cir. 1988); *Sampson v. Love*, 782 *F.*2d 53, 55-56 (6th Cir. 1986), *cert.* den. 479 *U.S.* 844 (1986); *Davis v. Wyrick*, 766 *F.*2d 1197, 1204-1205 (8th Cir. 1985), *cert.* den. 475 *U.S.* 1020 (1986); *Stranghoener v. Black*, 720 *F.*2d 1005, 1007-1008 (8th Cir. 1983); *Matias v. Oshiro*, 683 *F.*2d 318, 320 (9th Cir. 1982); *Jones v. Hess*, 681 *F.*2d 688, 693-694 (10th Cir. 1982); *Domainque v. Butterworth*, 641 *F.*2d 8, 13 (1st Cir. 1981); *United States v. Figueroa*, 411 *F.*2d 915, 916 (2d Cir. 1969). See also *Stevens v. Zant*, 580 *F.Supp.* 323, 325 (S.D. Ga. 1984). *Cf. Vasquez v. Hillery*, 474 *U.S.* 254, 258 (1986) (request by district court for additional documentary evidence which did not alter legal claim already presented to state courts did not undermine policies of exhaustion).

That is all that the Third Circuit Court of Appeals has ordered in this case. It recognized that general allegations of error based upon suppression of evidence, so-called "*Brady*"[7] claims are not exempted from the exhaustion doctrine's requirement that the petitioner provide the state court with the factual predicate upon which the specific claim is based. See also *Lanigan v. Maloney*, 853 *F.*2d 40, 45 (1st Cir. 1988), *cert.* den. 109 *S.Ct.* 788 (1989) (some claims of constitutional violations encompass such a broad scope that petitioner must specify exactly how rights were violated in state court and petitioner cannot change factual predicate in federal court without running

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[7] *Brady v. Maryland*, 373 *U.S.* 83 (1963).

afoul of exhaustion doctrine). Because questions of materiality rely in large part upon what evidence was suppressed and its impact upon the verdict, *United States v. Bagley*, 473 *U.S.* 667, 682 (1985), a state court not presented with the new factual material could not have engaged in the type of analysis *Brady-Bagley* requires and therefore, exhaustion has not been achieved. (App. at 23-24).

Landano argues that the Third Circuit decision is in conflict with the decision of *Austin v. Swenson*, 522 *F.*2d 168 (8th Cir. 1975), aff'd after remand, 538 *F.*2d 443 (8th Cir. 1976). That argument is unpersuasive for several reasons. First, in *Austin*, the federal district court had held an evidentiary hearing and then dismissed the habeas petition on exhaustion grounds. The Eighth Circuit Court of Appeals reversed, holding that a second hearing in state court, in a case in which the State had conceded exhaustion, was a waste of judicial resources. 522 *F.*2d at 170. Second, the Eighth Circuit itself in *Stranghoener v. Black*, *supra*, has adopted the uniform rule of the circuits that requires return to state court when new facts are presented in federal court. Third, the Eighth Circuit applied the rationale of the *Landano* court in *Eaton v. Wyrick*, 528 *F.*2d 477 (8th Cir. 1975) in which it held that a *Brady* claim that exculpatory fingerprint evidence was withheld had not been presented to the state courts and therefore, federal relief was unwarranted. Thus, the Eighth Circuit has not carved out an exception to the exhaustion doctrine when a *Brady* claim is presented and that view is fully consistent with the views of the federal courts of appeals and this Court as well. *Duckworth v. Serrano*, 454 *U.S.* at 3 (exception to exhaustion made

only when there is no opportunity to seek redress in state court).

Moreover, the Third Circuit opinion is fully consistent with this Court's decision in *Vasquez v. Hillery*, 474 *U.S.* 254 (1986). In *Vasquez*, this Court noted that documents requested by the district court, in the form of affidavits about the black population of King County eligible for grand jury service during the accused's trial and memoranda on statistical probability analysis, did not present any claim upon which the state courts had not passed, *i.e.*, these claims were clearly exhausted in state court. The additional documentation requested did not undermine the policies of exhaustion. *Id.* at 258. As the Third Circuit noted here, however, *Vasquez* is inapposite because the substance of Landano's federal claim was never presented to the state court and, therefore, the rationale of *Vasquez*, which permits a federal court to request additional documentation on an exhausted claim, is simply inapplicable. (App. at 31-32).

Finally, in an attempt to disparage the Third Circuit's ruling, Landano claims that the court relied upon cases which "almost exclusively dealt with exhaustion cases involving involuntary confessions, incompetence of counsel, or improper trial statements by a prosecutor arising from facts fully known to the petitioner while he was in state court." Pet. at 24-25 n.1. However, the Third Circuit cited as supporting authority for its position *Wise v. Warden, Maryland Penitentiary*, 839 *F.*2d 1030 (4th Cir. 1988), which also involved a *Brady* claim. In *Wise*, the allegation was suppression of evidence of negotiations by the State with a codefendant, a claim that had been raised in four state post-conviction proceedings and two ha-

beas petitions. *Id.* at 1032. At an evidentiary hearing held in conjunction with his third habeas petition, Wise produced a document, obtained from codefendant's counsel, that set forth the terms of the agreement between codefendant and the State. The district court dismissed the petition, and the dismissal was affirmed by the Fourth Circuit on exhaustion grounds because the documentary evidence presented to the federal court "significantly alters the posture of [petitioner's] claim. The state court, which has never been presented with this critical evidence, must be given an opportunity to evaluate the claim in its new posture and to make relevant findings of fact to which the federal courts must in turn defer." *Id.* at 1034. Thus, it is clear that other federal courts of appeal have recognized that *Brady* claims are not immune from the exhaustion requirement and that new evidence presented at the federal level which alters the factual claim must first be presented to the state court for its review. Because no actual or implicit conflict exists in the circuits on this issue and because the decision below was consistent with this Court's interpretation of exhaustion, the petition for *certiorari* must be denied.

POINT II

THE THIRD CIRCUIT COURT OF APPEALS RIGHTLY REFUSED TO CREATE A THEORY OF "CONSTRUCTIVE WAIVER" OF THE EXHAUSTION DEFENSE BASED UPON ALLEGED IMPROPRIETIES BY A PROSECUTOR, WHICH WOULD DENY STATE COURTS THE INITIAL OPPORTUNITY TO REVIEW CLAIMS OF CONSTITUTIONAL ERROR.

As an alternative ground for issuance of the writ, Landano argues that if he did not exhaust his state

remedies it was due to the bad faith suppression of exculpatory evidence by the state prosecutors. He therefore argues that by its actions the State "constructively waived" the exhaustion defense. The Third Circuit Court of Appeals refused to adopt this rationale because it would deny state courts the initial opportunity to review claims of constitutional violations. This decision was totally consonant with the goals of the exhaustion doctrine and in no way violated Landano's constitutional rights.

First and foremost the State strongly disputes the contention that it has engaged in a bad faith suppression in this litigation. As a legal matter, the good or bad faith of the prosecutor is irrelevant in deciding whether there had been suppression of material evidence. *United States v. Agurs*, 427 *U.S.* 97, 110 (1976); *Brady v. Maryland*, 373 *U.S.* 83, 87 (1963). In any event, the claim of bad faith suppression is unsupported by the record. First, the state courts and the Third Circuit have determined that there was no suggestive procedure in Portas' identification of Landano. (Ja152-154; Ja166-169); *Landano v. Rafferty*, 856 *F.*2d 569, 571-572 (3d Cir. 1988), *cert.* den. 109 *S.Ct.* 1127 (1989). Second, the withholding of information about Roller's involvement in other crimes was based on constructive knowledge on the part of the prosecutor and, thus, a finding of bad faith is simply unwarranted. *Landano v. Rafferty*, 856 *F.*2d at 573. Similarly, no bad faith can be imputed by the prosecutor's failure to disclose an investigation of Jacob Roth's activities that yielded no evidence of impropriety. Finally, the State asserted below that the Kearny Police Continuation Report was provided to trial counsel and that the handwritten note contained

no exculpatory evidence. (App. at 30 n.16). Thus, the factual predicate for Landano's argument that exhaustion should not be permitted as a defense is lacking.

Moreover, Landano's legal argument that the State should not be permitted to raise the exhaustion defense because of this so-called "pattern of suppression" also is without authority. As the Third Circuit noted, this Court has never ruled, either explicitly or implicitly, that the exhaustion defense can be precluded if the federal claim involves suppression of evidence and in fact "just the opposite has been implied. . . ." (App. at 33). See, *e.g.*, *Duckworth v. Serrano*, 454 *U.S.* 1, 3 (1980) (exception to exhaustion doctrine made only if there is no opportunity to seek redress in state court). Moreover, other courts of appeals have applied the exhaustion bar to federal review even when the claim is suppression of evidence. See *Wise v. Warden, Maryland Penitentiary*, 839 *F.*2d 1030, 1033 (4th Cir. 1988); *Eaton v. Wyrick*, 528 *F.*2d 477, 481-482 (8th Cir. 1975). To adopt Landano's argument would establish different categories of constitutional violations with exhaustion applying to some claims but not to others. That hardly can further the purpose of the exhaustion doctrine, which is to reduce federal and state tensions by giving the state courts the first opportunity to examine alleged violations of federal constitutional rights. Moreover, such a rule would not further the goal of exhaustion which is to have all factual allegations necessary to resolution of the issue already resolved before federal involvement. If the federal court were required to hold evidentiary hearings to resolve factual issues, it would adjudicate the merits before deciding the ques-

tion of exhaustion. These were the reasons that the Third Circuit refused to accept Landano's "invitation" to carve out an exception to the exhaustion requirement when *Brady* claims are alleged. (App. at 33-34 and n.19). That court refused to assume, as apparently Landano does, that "state courts will be any less protective of the constitutional rights of criminal defendants than federal courts." (App. at 37, footnote omitted).

Contrary to Landano's allegation, *Granberry v. Greer*, 481 *U.S.* 129 (1987) supports the State's position. In *Granberry*, this Court determined that the State could *attempt* to waive the exhaustion defense but the federal courts have the final decision on the matter. "If, . . . the case presents an issue on which an unresolved question of *fact* or of state law might have an important bearing . . . " the federal court may insist on complete exhaustion and remand the matter to state court. *Id.* at 134-135 (emphasis added). Accord, *Keller v. Petsock*, 853 *F.*2d 1122, 1127 (3d Cir. 1988). Thus, the Court has recognized that exhaustion of state remedies is so important that even an attempt by the State to waive that defense may be rejected. That hardly indicates that this Court would look favorably upon an exception to the exhaustion doctrine where suppression of evidence is alleged and the State asserts the exhaustion defense.

In sum, the Third Circuit's refusal to fashion a rule of "constructive waiver" of the exhaustion defense when allegations of bad faith on the part of the prosecutor are made was consistent with the goals of the exhaustion doctrine. Therefore, the petition for *certiorari* should be denied.

POINT III[8]

PETITIONER'S ALLEGATION THAT THE TRIAL COURT'S SUPPLEMENTAL CHARGE ENTITLES HIM TO RELIEF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED. MOREOVER, THE TRIAL COURT'S INSTRUCTION DID NOT HAVE SUFFICIENT POTENTIAL FOR COERCION AND, THEREFORE, DOES NOT REQUIRE REVERSAL OF PETITIONER'S CONVICTION.

Petitioner asserts that he is entitled to habeas corpus relief due to the trial court's *Allen*[9] instruction to the jury. Respondents submit that petitioner fails to set forth a constitutional claim upon which habeas relief can be granted.

After several weeks of trial, the jury in this case began its deliberations. The jury deliberated one afternoon before it was sent home for the weekend. When the jury resumed deliberations on Monday, at least half the day was consumed with the readback of trial testimony. The next morning the trial court received a note from the jury foreman indicating that the jury was unable to reach a unanimous verdict.

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[8] Petitioner also raised this identical issue in his previous petition for *certiorari*, which was denied by this Court. *Landano v. Rafferty, et al.*, 109 *S.Ct.* 1127 (1989).

[9] The "*Allen*" charge, enunciated by this Court in *Allen v. United States*, 164 *U.S.* 492 (1896), is designed to induce a deadlocked jury to reach a verdict. It has been rejected by many jurisdictions as overly coercive, because it instructs the minority holdout jurors to reexamine their position, without putting the same demand on the majority jurors. *See State v. Czachor*, 82 *N.J.* 392, 398, 413 *A.*2d 593, 596 (1980). The charge given in this case, which was not a traditional *Allen* charge, is reprinted in its entirety in the Counter-Statement of the Case.

The trial court was confronted with a jury that over a two day period had deliberated approximately one day in a murder trial that had lasted several weeks. The trial court responded to the note by giving an supplemental charge to the jury. The court told the jury that it could not compel a verdict but pointed out "the importance and desirability of reaching a verdict in this case." Immediately following this statement, the court told the jurors that they should not reach a verdict unless they "as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions."

The court also told the jury that the oath they took "places upon each of you as individuals the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusion of your fellow jurors." The court encouraged the jurors to be "open-minded" and to listen to and consider the opinions of the other jurors. The court did not focus on the minority jurors, but instead asked each juror to respect the opinion of the others and stated that "you should not hesitate to re-examine your own views in light of such discussion." Defense counsel did not object to this supplemental instruction. One hour later, the jury returned with its verdict.

Pursuant to 28 *U.S.C.* sec. 2254(a) a writ of habeas corpus may only be granted on the ground that an individual "is in custody in violation of the constitution or law or treaties of the United States." It is respectfully submitted that the trial court's supplemental instruction to the jury does not raise an issue of constitutional dimension.

This Court has continued to assert the validity of the *Allen* charge. *Lowenfield v. Phelps*, 484 *U.S.* 231, 237-238, reh. den. 485 *U.S.* 944 (1988). In order to determine whether a supplemental instruction is coercive, it must be considered "in its context and under all circumstances." *Lowenfield*, 484 *U.S.* at 237, quoting *Jenkins v. United States*, 380 *U.S.* 445, 446 (1965) (per curiam).[10]

The circumstances of this case indicate that the charge in question was not coercive. The supplemental instruction in this case is similar to the one given in *Lowenfield* in that "the charge given, in contrast to the so-called 'traditional *Allen* Charge,' does not speak specifically to the minority jurors." *Lowenfield*, 484 *U.S.* at 237-238. This case is also similar to *Lowenfield* in that the jury also returned with a verdict soon after receiving the supplemental instruction. Nevertheless, this Court found in *Lowenfield* that counsel's failure to object to the supplemental charge indicates that the potential for coercion now argued on appeal "was not apparent to one on the spot." *Lowenfield*, 484 *U.S.* at 240. Respondents contend that this reasoning is equally true in this case where defense counsel voiced no objection to the supplemental charge.

Respondents submit that given the length of this trial, the short period of deliberation, the absence of any polling of the jury, the lack of any objection to the supplemental charge by defense counsel, and the actual language of the supplemental instruction which

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[10] The ruling in *Jenkins* was based on this Court's supervisory powers over the federal court and not on constitutional grounds. *Lowenfield*, 484 *U.S.* at 239 n.2.

did not focus on the minority jurors, the potential for coercion in this case was nil. Thus, when the supplemental charge given by the trial court is considered "in its context and under all the circumstances" it is readily evident that the instruction was not "coercive" and did not deny petitioner any constitutional right. For these reasons, the petition for *certiorari* should be denied.

CONCLUSION

Based upon the foregoing, respondents urge that the petition for a writ of *certiorari* be denied by this Court.

Respectfully submitted,

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June 26, 1990